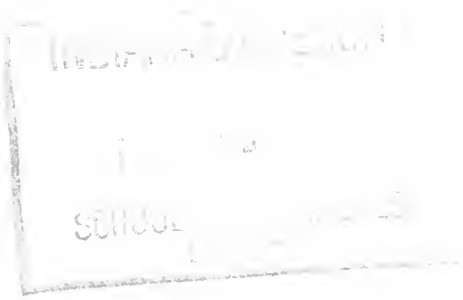

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Correction: Please note, the correct title to Professor L. Amede Obiora's Article in Volume 28, Issue 3 is New Wine, Old Skin: (En)gaging Nationalism, Traditionism, and Gender Relations.

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ARTICLES

"BY WHAT RIGHT?": THE SOURCES AND LIMITS OF FEDERAL COURT AND CONGRESSIONAL JURISDICTION OVER MATTERS "TOUCHING RELIGION"

ROBERT A. DESTRO*

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* Associate Professor of Law and Director of the Interdisciplinary Program in Law & Religion, Columbus School of Law, The Catholic University of America, Washington, D.C. Commissioner, United States Commission on Civil Rights, 1983-89; B.A., Miami University, 1972; J.D., University of California, Berkeley, 1975.

[T]he fact that the Court rules in a case . . . that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is.[1]

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1. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 193 (1962). Many thanks to Louis Fisher, Ph.D., of the Library of Congress Congressional Research Service, whose helpful comments, and reference to this quotation, were instrumental in bringing this phase of my research into the structure of the religious liberty guarantee to a close. This point is discussed at length in Mr. Fisher's book, AMERICAN CONSTITUTIONAL LAW (2d ed. 1995). I would also like to acknowledge all those others including my research assistants, who will remain nameless for fear of forgetting one or another, whose comments, criticisms and encouragement led me to conclude that the question: "Who left the Court in charge?" was not only a legitimate

INTRODUCTION

For nearly fifty years it has been apparent that, for all practical purposes, federal judges claim a de facto "revisory" power over both federal and state policy on the subject of religious freedom, including the sensitive topic of church-state relations. Until the United States Supreme Court rendered its 1990 decision *Employment Division v. Smith*,[2] it seems largely to have been assumed that this is simply the "way it is" or, perhaps more accurately, "the way it should be."

The Court's decision in *Smith*, however, changed all this—at least insofar as the Free Exercise Clause[3] was involved. Almost immediately, it became an article of faith among most advocates of religious liberty that *Smith* was wrongly decided and that the rule announced in the case should not be followed.[4] State courts were urged to read the religious liberty provisions of their respective state constitutions more broadly than the Court had read the Free Exercise Clause in *Smith*.[5] More importantly, Congress was urged to "restore" the constitutional status quo that prevailed prior to *Smith* by enacting legislation pursuant to its power under Section Five of the Fourteenth Amendment.[6] The Religious Freedom Restoration Act of 1993 (RFRA)[7] was the result of that effort.

RFRA contains explicit congressional "findings" to the effect that the Supreme Court's Free Exercise Clause jurisprudence is no longer adequate to protect religious liberty, and that its prior case law provided "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[8] The Supreme

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one, but an under-appreciated one as well.

2. 494 U.S. 872 (1990).

3. U.S. CONST. amend. I.

4. *See, e.g.*, Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 231-33 (1991) (referring to *Smith* as "the virtual abandonment of the Free Exercise Clause," "reach[ing] a low point in modern constitutional protection under the Free Exercise Clause," and "leav[ing] the Free Exercise Clause without independent constitutional content and thus, for practical purposes, largely meaningless"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 140 (1992) ("*Smith* converts a constitutionally explicit liberty into a nondiscrimination requirement, in violation of the most straightforward interpretation of the First Amendment text."); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 841 (1992) (summarizing a symposium of ten articles and finding that "[n]o one in this symposium takes seriously the possibility that *Employment Division v. Smith* might be defensible.").

5. *See, e.g.*, People v. DeJonge, 501 N.W.2d 127 (Mich. 1993); Porth v. Roman Catholic Diocese, 532 N.W.2d 195, 199 (Mich. Ct. App. 1995) (declining to do so, but stating that the Michigan view was more in accordance with Justice O'Connor's concurring opinion in *Smith*); State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990); First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992) (Utter, J., concurring). *See generally* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992) (arguing that state courts have not developed an independent jurisprudence of state constitutional law).

6. U.S. CONST. amend. XIV, § 5.

7. 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993).

8. *Id.* § 2000bb(a)(5). The findings state that:

(a) Findings

Court, however, remains unmoved by these findings.[9]

These are important developments, both legally and politically. The Court has long been viewed in some quarters as hostile to religious liberty,[10] but the nature of the issues involved in the cases forming the basis of this view—polygamy, school prayer, tuition assistance for children in religiously-affiliated schools, respect for Native American sacred sites, and the free exercise rights of military personnel—has led both courts and some political commentators to view the claims made in those cases as idiosyncratic. The passage of RFRA, and the rejection of the *Smith* Court's rationale in cases litigated under state constitutions, however, indicates the existence of broadly-based *political* discontent with at least the "free exercise" component of the Court's religious liberty jurisprudence.

Legally, these developments are even more significant. RFRA can be read as an explicit claim that Section Five of the Fourteenth Amendment makes Congress the final arbiter of Free Exercise Clause standards of review. State court decisions rejecting the *Smith* holding indicate that the state courts also view themselves as free to interpret their respective state constitutions more "expansively" in matters affecting religious liberty. Like Congress, these state courts assume that the Supreme Court does not always have the final word on what are commonly called "First Amendment interests."

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Id. §§ 2000bb(a)-(b).

9. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

10. *See generally* WILLIAM A. DONOHUE, TWILIGHT OF LIBERTY: THE LEGACY OF THE ACLU (1994); JAMES D. HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991); RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984); Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992); Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age*, 1993 B.Y.U. L. REV. 163.

This Article examines the extent to which the Court's power "to say what the law is"[11] on the sensitive subject of religious liberty has been, and continues to be, constrained by the lawmaking powers of Congress and the states. Though the topic is obviously an important one, it has not been examined systematically. Most of the case law and commentary focuses on the *limits* which the Constitution imposes, or should be held to impose, on the powers of Congress and the states.[12] The Court's power to define those limits appears, by contrast, to be one of those "fundamental assumptions [that] 'appear[s] so obvious that people do not know what they are assuming because no other way of putting things has ever occurred to them.'"[13]

In an article published elsewhere,[14] I have argued that the application of the Test Clause of Article VI[15] and the First Amendment[16] to the functions of the "Judicial Department," including the power of judicial review, is accomplished "structurally"; that is, by reference to the Court's position in the plan of government created by the Constitution.[17] The present inquiry builds upon that analysis, and asks the following question:

> If Congress or the legislatures and courts of the several states perceive the Court's vision of religious liberty to be either unconstitutionally narrow, discriminatory, or both, what political and legal options are available at the federal or state levels to modify or lessen the impact of the federal rule(s) announced by the Court?

This question is both "structural" and "jurisdictional." It is "structural" in the sense that it speaks to the relative competence of Congress and the states (legislatures and courts) to assure that religious liberty is accorded a sufficiently high place in the hierarchy of fundamental values. It is "jurisdictional" in the sense that the constitutionality of RFRA—which is intended to supplant the free exercise policy announced by the Supreme

---

11. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

12. Much of the recent commentary on RFRA and the powers of Congress under Section Five of the Fourteenth Amendment fits into this category. *See, e.g.*, Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995); Ira C. Lupu, *Of Time and the RFRA*, 56 MONT. L. REV. 171 (1995).

13. Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 247-48 (1978). Though Dean Cramton was speaking of the unarticulated value systems that influence American legal education, the criticism is equally applicable to cases involving religious liberty.

14. Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355 (1995).

15. U.S. CONST. art. VI, cl. 3.

16. *Id.* amend. I.

17. "Structural" analysis has been the methodology in an increasing number of articles. *See, e.g.*, Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Stephen L. Carter, Comment, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992); E. Donald Elliot, *Why Our Separation of Powers Jurisprudence is so Abysmal*, 57 GEO. WASH. L. REV. 506 (1989); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991).

Court in *Smith* with a legislatively mandated "return"[18] to the policy embodied in *Sherbert v. Verner*[19] and *Wisconsin v. Yoder*[20]—turns on three closely-related, but conceptually distinct, questions:

> 1) Does Congress have the power to legislate on the subject of the free exercise of religion?
>
> 2) Is congressional legislation, adopted pursuant to Section Five of the Fourteenth Amendment and which purports to protect or "restore" protection to the free exercise of religion, consistent with the free exercise norm it seeks to "enforce?"
>
> 3) To what extent does the Court's Article III[21] power "to say what the law [of the First and Fourteenth Amendments] is" limit the powers of Congress under Article I[22] and Section Five of the Fourteenth Amendment to "prescribe[] the rules by which the duties and rights of every citizen are to be regulated"[23] through enacting a prospective change in the law enunciated by the Court?

Part I of this Article will look at the degree to which the federal judiciary's vision of religious liberty has become controlling. Part II will undertake a "structural" evaluation of two cases which speak directly to the power of legislatures to accommodate religious liberty concerns: *Texas Monthly, Inc. v. Bullock*[24] and *Employment Division v. Smith*.[25] Part III will consider the impact of the text and structure of the Fourteenth Amendment on the norms incorporated from the First Amendment by utilizing a model of "structural incorporation" to examine just how much federal power—or jurisdiction—actually exists concerning matters "touching religion."[26] Part IV will discuss the legitimacy of state and federal legislative efforts to protect religious liberty and concludes that such efforts are legitimate to the extent that they are consistent with the norms of equal citizenship and protection which lie at the heart of the Fourteenth Amendment. More specifically, this Part will argue that congressional and state efforts to enact laws which provide "affirmative" protection for religious liberty have a greater claim to structural validity under the First and Fourteenth Amendments than do most of the Supreme Court's

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18. 42 U.S.C. §§ 2000bb(a)(3-4), (b)(1) (Supp. V 1993). This formulation assumes two things: 1) that the statutory language accurately captures the meaning of the prior case law; and 2) that the prior case law is a more accurate rendition of the command of the Free Exercise Clause than the Court's formulation of the rule in *Smith*.

19. 374 U.S. 398 (1963).

20. 406 U.S. 205 (1972).

21. U.S. CONST. art. III.

22. *Id.* art. I.

23. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

24. 489 U.S. 1 (1989).

25. 494 U.S. 872 (1990).

26. The phrase is derived from the proposed language for a federal religious liberty clause in the Constitution authored by Samuel Livermore of New Hampshire: "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 ANNALS OF CONG. 729 (Joseph Gales ed., 1789).

pronouncements under the Religion Clause to date.

I. THE BINDING NATURE OF THE FEDERAL VISION

A. Introduction

The degree to which the Court claims the power to define the rules which shape our national understanding of religious liberty is not immediately apparent. Only when the Court renders a decision which seems to break with prior precedent, such as Employment *Division v. Smith*,[27] does the "change" in the rules constructed by the judiciary become obvious. As long as the interpretive ratchet appears to freely turn in the direction of "increased" liberty or "separation," it is possible for interested observers to imagine that the Court is only playing the "intermediate" role envisioned by Alexander Hamilton in *The Federalist No. 78*.[28] But when the Court either departs radically from, or raises serious questions about, the nature of its role, as it did in both *Sherbert v. Verner*[29] and *Smith*, its role as the nation's chief policy-maker on religious liberty matters stands clearly revealed.

Smith is a significant case for many reasons. However, in the long-run, its legal significance may be eclipsed by the reaction to the decision, both political and judicial. The post-*Smith* case law and commentary tell us much not only about the manner in which judges, commentators, and religious liberty activists view the substantive liberty protected by the Free Exercise Clause, but it also speaks volumes concerning their perception of the role of the Court in religious liberty cases.[30] In fact, the Court's opinions are now so closely identified with the substantive scope of the Religion Clause(s)[31] that Dr. Dean Kelley, formerly of the National Council of Churches, was moved to assert in testimony before the House Judiciary Committee that the practical impact of *Smith* was a judicial "repeal" of the Free Exercise Clause itself.[32]

Though I believe Dr. Kelley and other outspoken opponents of *Smith* have overstated

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27. 494 U.S. 872 (1990).

28. And this is so even if there is considerable evidence that the protection provided is not nearly so expansive as it appears to be. Judge John Noonan of the United States Court of Appeals for the Ninth Circuit has provided a useful list of free exercise cases and their outcomes in the Supreme Court and the federal courts of appeal which is current to September 1988. EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 622, 625 (9th Cir. 1988) (Noonan, J., dissenting).

29. 374 U.S. 398 (1963).

30. *See generally The James R. Browning Symposium for 1994: The Religious Freedom Restoration Act*, 56 MONT. L. REV. 5 (1995).

31. There is considerable debate over the proper nomenclature to be assigned to the religion-specific provisions of the First Amendment. Some, including perhaps a majority of the Court, view these provisions as analytically distinct clauses, others view them as integral parts of a single clause. The relevance of this controversy is addressed at greater length *infra* in the text accompanying notes 82-122.

32. *Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 27 (1990) (statement of Rev. Dean M. Kelley, Counselor on Religious Liberty, National Council of Churches). In Dr. Kelley's view, the majority's rejection of the compelling state interest standard of review in cases involving religious practice burdened by laws of general applicability repeals the Free Exercise Clause of the First Amendment.

their case somewhat, they do raise several important questions. How, for example, did an "incorrigibly religious"[33] country like the United States become so dependent upon the Court for guidance on religious liberty matters that its backsliding from precedent, established in the nine years between *Sherbert v. Verner*[34] and *Wisconsin v. Yoder*,[35] is perceived to be a "repeal" of the Free Exercise Clause? Is it wise in a liberal democracy to entrust such power to nine Justices appointed for life terms? More to the point: By what right does the federal judiciary exercise authority over matters of religious liberty anyway?[36]

Like so many other questions of great import in our pluralistic, continental democracy, the Constitution and its amendments do not address this question directly. All we know for certain from the text of the Constitution is that the three branches of the federal government have been granted powers which, by their nature, are conducive to the preservation of the general welfare.[37] Significantly, the power to regulate religion, or its place in society, was not one of them. There is no express power under the original Constitution which authorizes Congress to make laws respecting either a state or a federal establishment of religion, and none of Congress' enumerated powers, save the most general,[38] would seem to authorize the enactment of laws designed to inhibit religious exercise. Legislation requiring a religious test "as a Qualification to any Office or public Trust under the United States" is expressly forbidden.[39]

The text of the amendments also fails to directly answer the question. We learn from the First, Fifth, Ninth and Tenth Amendments that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,"[40] that "[n]o person shall . . . be deprived of life, liberty or property without due process of law,"[41] and that the enumerated powers of the federal government are not to be viewed as incompatible with the rights retained by the people and the states, respectively.[42] Thus, the practical impact of the Bill of Rights is to limit the ability of Congress to conclude that laws respecting religious establishments (i.e., laws creating, prohibiting, or otherwise regulating "an establishment of religion"), or laws which limit free exercise of religion, are in the public

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33. The phrase is borrowed from Rev. Richard John Neuhaus, who describes Americans as "incorrigibly religious," a description that is borne out in all of the survey data on religiousness. RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE 113 (1984).

34. 374 U.S. 398 (1963).

35. 406 U.S. 205 (1972).

36. The phrase is borrowed from Louis Lusky. LOUIS LUSKY, BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION (1975).

37. For example, Congress has the power to lay and collect taxes, to provide for the common defense and general welfare of the United States, and to establish uniform rules on matters relating to the growth and development of the United States and its economy. *See* U.S. CONST. art. I, §§ 8, 9, 10; *id.* art. IV.

38. The Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18; The General Welfare Clause, U.S. CONST. art. I, § 8, cl. 1.

39. U.S. CONST. art. VI, cl. 3.

40. *Id.* amend. I.

41. *Id.* amend. V.

42. *Id.* amends. IX, X.

interest, and therefore justifiable under, or in aid of,[43] one of its enumerated powers.

From the text of the Fourteenth Amendment we ascertain three points important to this inquiry. First, that the states may not inhibit citizens of the United States in the exercise of their federal privileges and immunities.[44] Second, that the states are prohibited from denying to any person within their jurisdiction due process or equal protection of the laws.[45] Third, that Congress has the power to assure that the states comply with otherwise valid laws adopted to "enforce" the Fourteenth Amendment.[46]

Viewed as a question of power allocation, the amended Constitution seems, at first glance, to deal only with questions of *legislative* overreaching on matters of religious liberty; the First Amendment, by its terms, limits only the acts of Congress, and the Fourteenth, only the acts of the states. But such a reading would be too narrow. John Marshall cautioned early-on that "[i]n considering [such] questions[s] . . . we must never forget that it is a *constitution* we are expounding."[47] Not only does the text clearly delineate what is permitted and prohibited, but it also contains important structural limitations which delineate the authority of the states and federal government, respectively, and which define the powers of the legislative, executive and judicial branches of the federal government.

Why then, has the national policy governing religious liberty been controlled largely, at least until the adoption of RFRA, by federal judge-made rules?[48] If Article III does not even *expressly* grant the federal judiciary the power of judicial review, why should it be assumed that the implied (but necessary) power recognized in *Marbury v. Madison*[49] leaves the federal courts in sole charge of what virtually all observers—especially those who lived during the founding generation—have viewed as one of the most exquisitely sensitive issues in all of public policy?[50] Although this question admits of many answers, it has received comparatively little attention.

The analytical task requires consideration of two basic structural questions:

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43. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

44. U.S. CONST. amend. XIV, § 1, cl. 2.

45. *Id.*

46. *Id.* amend. XIV, § 5.

47. *McCulloch*, 17 U.S. (4 Wheat.) at 407 (emphasis added).

48. Until the incorporation of the First Amendment, there was not a "national policy" defining the substantive content of religious liberty. Congressional policy dealing with religion or religious liberty applied only in the discrete subject areas over which Congress had legislative jurisdiction. *See, e.g.*, Revenue Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (exempting religious, charitable and educational organizations from the first income tax); Act of March 3, 1791, ch. XXVIII, § 5, 1 Stat. 222, 222-23 (creating the post of Army chaplain). Pre-incorporation cases such as Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923), though "national" in their scope and beneficial to religious liberty interests, were not decided on religious liberty grounds. The Incorporation Doctrine is discussed at greater length *infra* Part III.

49. 5 U.S. (1 Cranch) 137, 177 (1803).

50. During the debate of the House of Representatives, sitting as a Committee of the Whole on August 15, 1789, Congressman Daniel Carroll of Maryland is quoted as having noted that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." CHESTER J. ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 126 (1964) (quoting 1 ANNALS OF CONG. 730 (Joseph Gales ed., 1789)).

1) What express or implied power(s) respecting religious liberty questions are *granted* to the federal courts?; and

2) What constraints, express or implied, operate to *limit* judicial authority respecting religious liberty?

B. The Nature of the Judicial Interest

The judicial process is, by definition, a resolution of discrete "cases or controversies." In contrast with norms fixed by legislation, rules developed through a case-by-case analysis tend to remain "in process" over a long period of time. The Court's development of the federal constitutional law of religious liberty has followed this pattern.

From the time of the founding period through most of the Nineteenth Century, the federal courts developed little, if any, case law that contributes significantly to our present-day understanding of the concept of religious liberty.[51] The Court had not yet "applied" the First Amendment to the states, and the general view in cases where the First Amendment *did* apply was that religious belief, while important, could not justify behavior that the community viewed as antisocial. In *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, Justice Bradley wrote that "[t]he State has a perfect right to prohibit . . . all . . . open offences against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practised."[52]

Although both *Pierce v. Society of Sisters*[53] and *Meyer v. Nebraska*[54] are often given as examples of "First Amendment" case law because the controversies resolved in those cases were integrally bound up with the issue of religious freedom and education, the process of defining the "incorporated" norms of the First Amendment truly began in earnest with *Cantwell v. Connecticut*.[55] The *federal* constitutional law of religious liberty

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51. *Compare* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) *with* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991) *and* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992). *See also* David M. Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514 (1981).

52. 136 U.S. 1, 50 (1890) (citing Davis v. Beason, 133 U.S. 333, 342-43 (1890)).

53. 268 U.S. 510 (1925).

54. 262 U.S. 390 (1923).

55. 310 U.S. 296, 303 (1940). The process actually began much earlier, and has its roots in the Court's conception of substantive due process. The dissenting opinion of Justice Brandies in Gilbert v. Minnesota, 254 U.S. 325, 337-38 (1920) (quoting United States v. Cruikshank, 92 U.S. 542, 552 (1875)) argues that:

> The right to speak freely concerning functions of the Federal Government is a privilege or immunity of every citizen of the United States which, even before the adoption of the Fourteenth Amendment, a State was powerless to curtail. . . . Were this not so "the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or duties of the national government" would be a right totally without substance.

Building on the logic of substantive due process, he noted that he had:

has thus been "in process" for approximately fifty years, but the Court has yet to articulate clearly the precise nature and content of the religious liberty guarantee "incorporated" via the Fourteenth Amendment. What we have is an amalgam of rules which are, to put it mildly, confusing.[56] By the Court's own admission, its current jurisprudence is a

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> difficulty in believing that the liberty guaranteed by the Constitution, which has been held to protect against state denial the right of an employer to discriminate against a workman because he is a member of a trade union, the right of a business man to conduct a private employment agency, or to contract outside the State for insurance of his property, although the legislature deems it inimical to the public welfare, does not include liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism; so long, at least, as Congress has not declared that the public safety demands its suppression. I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property.

Id. at 343 (citations omitted).

The next case in which the First and Fourteenth Amendments are mentioned is Gitlow v. New York, 268 U.S. 652 (1925). In *Gitlow*, the Court simply assumed that the liberties of speech and press were "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666. By the time the Court decided Near v. Minnesota, 283 U.S. 697 (1931), the Court felt:

> It [was] no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property.

Id. at 707 (citations omitted).

The incorporation of the Religion Clause follows a similar pattern. The concurring opinion of Justice Cardozo, joined by Justices Brandies and Stone, in Hamilton v. Regents of the Univ. of California, 293 U.S. 245, 265 (1934), "assume[d] for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states," even though Justice Cardozo goes to great lengths to demonstrate why that liberty is not violated by compelling a student having religious objections to enroll in military training as a precondition for enrollment in the University of California. In language reminiscent of the Court's approach in Employment Div. v. Smith, 494 U.S. 872 (1990), Justice Cardozo wrote:

> Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

Hamilton, 293 U.S. at 268.

The Court had, but avoided, the opportunity to address the Religion Clause question directly in Lovell v. City of Griffin, 303 U.S. 444, 450 (1938), choosing instead to place its reliance on the already firmer foundation of the incorporated Speech and Press Clause.

56. In Murray v. City of Austin, 947 F.2d 147, 163 (5th Cir. 1991), Judge Myron Goldberg noted in dissent that "[a]nyone reading Establishment Clause precedent—the cases on non-purposeful, symbolic government support for religion—cannot help but be struck by the confusion that reigns in this area."

"'blurred, indistinct and variable' [set of rules which are] 'depend[ent] on all the circumstances of a particular relationship.'"[57]

This is not surprising. The Due Process Clause of the Fourteenth Amendment is the conduit through which the First Amendment is "applied" to the states by the United States Supreme Court, and the Court has held, rather consistently, that the process of giving it substantive content is, at bottom, a balancing process. In *Planned Parenthood v. Casey*,[58] the Court adopted the formulation suggested by Justice Harlan in *Poe v. Ullman*:[59]

> The best that can be said is that through the course of this Court's decisions it [the due process definition of "liberty"] has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.

As a result, case law applying the First Amendment to both Congress and the states is best understood as a reflection of the federal judiciary's vision of two related, but distinct, topics: 1) the substantive balance to be struck between religious liberty and the demands of organized society, and 2) the appropriate *political* balance to be struck among and between the federal judiciary, the Congress, and the states.

But where does the Court *find* the authority to strike such "balances" in the first place? This is a "first order," or jurisdictional, question which has simply been glossed over in the Court's incorporation project. It cannot, however, be ignored. Separation of powers and federalism are particularly important issues when the topic is individual rights, especially if a plausible case can be made either that the Court is wrong, or that it has exceeded its jurisdiction. When that happens, there are only two places aggrieved citizens can go for a remedy: to Congress, or to their state of residence.

This is why the text of the Fourteenth Amendment is an important, but generally overlooked, factor in the "incorporation equation." Not only is its language the source of judicial authority to "incorporate" the Bill of Rights and other, extra-constitutional liberties, but its history also speaks volumes concerning the very power allocation question with which this Article is concerned. The Reconstruction Congress was well aware of the Court's Article III powers and took a dim view of the manner in which that power had been exercised with respect to the issue of slavery.

The executive branch also took a dim view of the manner in which the Court exercised its power. President Lincoln's *First Inaugural Address* grappled with the political problems which arise in the aftermath of politically unpopular Supreme Court decisions. He recognized, correctly, that Supreme Court decisions are "final" in two ways: they resolve a given case or controversy, and they become a part of the edifice known as stare decisis.[60] Whether or not the Court's views on the subject are "correct"

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57. Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

58. 112 S. Ct. 2791, 2806 (1992) (plurality opinion).

59. 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

60. Abraham Lincoln, First Inaugural Address (March 4, 1861), *in* SPEECHES AND LETTERS 165, 171

as a matter of constitutional or political theory, justice, or morality, the rules adopted by it to govern future cases must be respected as constitutional law unless and until they are modified or changed by the Court, by constitutional amendment, or by Congress acting pursuant to its express authority to enforce certain constitutional guarantees.[61]

The Fourteenth Amendment was expressly designed by the Reconstruction Congress to assure that *political*, as well as judicial, remedies would be available to those aggrieved by the exercise of either state power or "the judicial power of the United States." Not only does the Amendment grant to Congress the power to assure that the rights of citizens and others are protected, but the Citizenship Clause also restores power to the states which had been taken from them by the Supreme Court.[62] Thus, when the assertion is that the federal government's definition of a substantive constitutional guarantee is too narrow, the explicit federalism of the First, Ninth and Tenth Amendments remains, true to its original design, as a "structural" protection designed to limit the impact of the federal vision on the people's understanding of their rights.

Since this is, in fact, the implicit claim made by the many commentators who urged, after *Smith*, that Congress and the states set their own respective paths, we return to the problem at hand: How to determine *whose* vision of religious liberty is controlling. *Texas Monthly, Inc. v. Bullock*[63] and *Employment Division v. Smith*[64] provide some important clues.

II. A "STRUCTURAL" EVALUATION OF *TEXAS MONTHLY, INC. V. BULLOCK* AND *EMPLOYMENT DIVISION V. SMITH*

In general, commentators view *Texas Monthly, Inc. v. Bullock*[65] as an "Establishment Clause" case, and *Employment Division v. Smith*[66] as a "Free Exercise Clause" case. This is a bit surprising, since both cases involve judicial review of legislative decisions which either grant or withhold an exemption from an otherwise neutral law of general applicability. The next section views these cases together, through a "structural" lens, to determine what, if anything, can be learned about the Court's view of the structure and substance of the incorporated First Amendment.

A. The Nature of the Legislative Interest

Before turning to a review of the cases, however, it will be useful to take a brief look at the nature of the interest that legislatures have in the preservation of religious liberty. Congressional enactments form the basis for the litigation of most constitutional claims,[67] including those which allege violations of the religious liberty guarantee. State constitutions and statutory law provide an additional source of protection.

(Merwin Roe ed. 1943).

61. *See, e.g.*, U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

62. *See infra* text accompanying notes 163-80.

63. 489 U.S. 1 (1989).

64. 494 U.S. 872 (1990).

65. 489 U.S. 1 (1989).

66. 494 U.S. 872 (1990).

67. 28 U.S.C. § 1331 (1988); 42 U.S.C. §§ 1983, 1985 (1988).

Notwithstanding the limits that the First and Fourteenth Amendments and the Test Clause impose on their respective powers, Congress and the states have both the power and the duty to assure that the norms embodied in those provisions and their state law counterparts are respected.

Much of the case law and commentary simply assumes that the states are free to apply more "stringent" standards under their own constitutions and laws, provided that the outcome is otherwise consistent with the Court's interpretation of the First Amendment.[68] To the extent that state laws and judicial interpretations are consistent with the norms of equal citizenship embodied in the Fourteenth Amendment,[69] this is as it should be. But this is not the way it is.

In practice, the Establishment Clause is viewed as setting the upper boundary or "ceiling" on accommodation of religion and cooperation with religious believers and institutions, and the Free Exercise Clause is perceived as the "floor," or the minimum level of protection required.[70] In between (the area of "tension" between the two clauses) lies the realm of religious liberty, permissible accommodation, and mandated equality.[71]

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68. What makes a state standard either "broader" or "stricter" than the applicable standard to be applied at the federal level appears to depend upon the nature of the claim asserted. In the "no-aid" context, the view is that the state rule is "stricter" than the federal non-establishment rule, whenever it denies assistance that the United States Supreme Court would permit. Where the assertion is that free exercise rights are at stake, a state standard is "broader" or "more expansive" than its federal counterpart when a state permits assistance or accommodations which the Unite States Supreme Court does not require. *Compare, e.g.,* Witters v. State, 689 P.2d 53 (Wash. 1984), *rev'd sub. nom.* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986), *reaffirmed on state constitutional grounds*, 771 P.2d 1119 (Wash. 1989), *cert. denied*, 493 U.S. 850 (1989) *and* Wheeler v. Barrera, 417 U.S. 402 (1974) *with* Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990) *and* State v. Hershberger, 462 N.W.2d 393 (Minn. 1990). Viewed from an individual perspective, however, the distinction between a "no-aid" and "free exercise" case has little practical significance. The issue is whether individual freedom or equality interests are recognized. *Compare* Garnett v. Renton Sch. Dist., 772 F. Supp. 531 (W.D. Wash. 1991) (Equal Access Act does not preempt state constitutional provisions which are said "stricter" than the Establishment Clause), *rev'd*, 987 F.2d 641 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 72 (1993) *with* Hoppock v. Twin Falls Sch. Dist., 772 F. Supp. 1160 (D. Idaho 1991) (Equal Access Act has preemptive effect). *See generally* Robert A. Destro, *Religious Freedom During the 1985-1986 Supreme Court Term: Adrift on Troubled Waters*, 6 RELIGIOUS FREEDOM REP. 481 (1986).

69. *See infra* text accompanying notes 144-251.

70. The image of religion surrounded on all sides by the regulatory power of the secular state is so closely akin to Roger Williams' metaphor of "the garden and the wilderness" that it might be mistaken for it. *See* MARK D. HOWE, THE GARDEN AND THE WILDERNESS (1965). Williams, however, was concerned about setting boundaries on state powers that harm or otherwise taint the religious community. The Supreme Court's concern—primarily "excessive entanglement" and "endorsement"—appear to be drawn straight from John Locke, who would probably be quite surprised at the extent to which such analytical constructs have been useful in the Court's attempts to "distinguish exactly the business of civil government from that of religion and . . . settle the just bounds that lie between the one and the other." John Locke, *A Letter Concerning Toleration, in* THE BELIEVER AND THE POWERS THAT ARE 78, 80 (John T. Noonan ed., Macmillan 1987).

71. Though their importance in the overall structure of the religious liberty guarantee cannot be doubted, the explicit non-discrimination norms of the Test and Equal Protection Clauses are rarely discussed—even when they are clearly relevant. *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680 (1989) (rejecting a claim of alleged

Because *Smith* was viewed as knocking out the "floor" from under this edifice, increasing attention has been given to the question of congressional power to enact comprehensive legislation that would "restore" the "floor," either by defining the scope of religious liberty for federal purposes,[72] or by singling out religious liberty for special protection where that approach may be warranted.[73] This presents a problem: Federal control over the substance of individual rights is precisely the situation the framers of the Bill of Rights sought to avoid with (among others) the First, Ninth and Tenth Amendments. The focus, therefore, must shift to the Fourteenth Amendment. Its language, structure and history leave no doubt that it was designed to "federalize" at least some aspects of individual rights, including religious liberty. So what *is* the locus of federal power to protect and define those rights when the states fail to do so? Is it the Congress, the Court, or both?

B. Texas Monthly, Inc. v. Bullock: Navigating the Space Between Scylla and Charybdis[74]

The Texas Monthly is a general circulation magazine devoted to a wide range of issues of interest to readers in the State of Texas. In 1985, it objected to the Texas sales tax exemption for "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings sacred to a religious faith."[75] In arguments before the Supreme Court, *The Texas Monthly* advanced two theories to support its claim that the Texas practice was unconstitutional: First, that an exclusive tax exemption for religious publications serves only to promote religion itself, which is prohibited under the Establishment Clause.[76] Second, that the Free Press Clause of the First Amendment

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religious discrimination by the Internal Revenue Service).

72. The structure of RFRA bears witness to this perception. Though there was a clear consensus that the "floor" of the federal edifice should be rebuilt by "restoring" pre-*Smith* standards of review in free exercise cases, there was no consensus with respect to the "ceiling." The Act contains an "exception" which purports to leave unaffected the Court's current jurisprudence under the Establishment Clause. 42 U.S.C. § 2000bb-4 (Supp. V 1993).

73. The power of Congress and the states to provide special protection for the press and electronic media is generally assumed without much discussion. For example, Congress enacted the Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1877 (codified at 42 U.S.C. §§ 2000aa to 2000aa-12 (1988)), in response to Zurcher v. Stanford Daily, 436 U.S. 547 (1978). The effect of the statute is to enact special rules which govern investigators seeking documents from the media. 42 U.S.C. § 2000aa(b)(3). *See generally* Richard Rosen, Comment, *A Call For Legislative Response To New York's Narrow Interpretation of the Newspersons' Privilege:* Knight—Ridder Broadcasting Inc. v. Greenberg, 54 BROOK. L. REV. 285 (1988); Sam Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. LEGIS. 233, 274 (1974). A similar approach was taken with respect to church documents when Congress enacted the Church Audit Procedures Act of 1984, Pub. L. No. 98-369, 98 Stat. 1034 (codified at 26 U.S.C. § 7611 (1994)). *See also* 26 U.S.C. § 3127 (providing special Social Security tax exemption for employers and their employees where both are members of religious faiths opposed to participation in Social Security Act programs).

74. *See infra* note 253 and accompanying text.

75. *See* TEX. TAX CODE ANN. § 151.312 (West 1982) (amended 1989).

76. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 11 (1989).

prohibits tax exemptions which discriminate on the basis of a publication's content.

The State of Texas defended the tax exemption by arguing that the law was a reasonable accommodation of religious efforts to spread belief and practice which could be justified under the Free Exercise Clause. Though only fifteen states at the time had express sales tax exemptions like that of Texas,[77] the practice of exempting religious institutions from general taxation schemes[78] remains widespread and antedates the Constitution itself.[79] The rule announced in the case would therefore have wide application beyond the immediate parties to this particular controversy.

The case thus presented the Court with an opportunity to begin the task of reconciling what appear to be at least three seemingly divergent lines of constitutional authority: the Speech and Press Clause, the Establishment Clause, and the Free Exercise Clause.[80] But unlike the Texas Court of Appeals, which took up the challenge and rejected *The Texas Monthly's* claims,[81] the United States Supreme Court could not even agree on an approach.

The Justices split into four factions. The plurality was comprised of three groups: Justices Brennan, Marshall, and Stevens; Justices O'Connor and Blackmun; and Justice White. The dissenters were Chief Justice Rehnquist, Justices Scalia, and Kennedy. The fundamental nature of the disagreements within the Court are best illustrated in structural terms; for no matter what the Court decided, it could not avoid taking an explicit position on the relationship among the clauses of the First and Fourteenth Amendments, and the relative competence of Congress, the states and the Court in resolving apparent conflicts.

1. Construing Constitutional Norms: Should the Analysis of First Amendment Issues be Categorical or Integral?—From a structural perspective, the three opinions in the plurality have much in common. The defense of the Texas tax exemption rested on the argument that the First Amendment, *taken as a whole*, permits broadly-based religious

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77. *See id.* at 30 (Scalia, J., dissenting). At least fifteen of the forty-five states that have sales and use taxes have express exemptions for sales of religious literature. In practice, even more states exempt sales of religious goods and goods used by religious organizations from certain taxes of general applicability.

78. This would include income, sales, use, real and personal property, motor vehicle, excise, and certain types of employment taxes. Neither the United States nor any of the states has adopted a value-added tax (VAT).

79. For a summary of the history of religious tax exemptions in the pre- and early constitutional period, see Walz v. Tax Comm'n, 397 U.S. 664 (1970).

80. Depending on the construction given these provisions, there may be Equal Protection Clause issues as well. At this point an extended discussion of the topic would be premature.

81. Utilizing the three-part test for Establishment Clause analysis set out in Lemon v. Kurtzman, 403 U.S. 602 (1971), the Texas Court of Appeals held that the sales tax exemption had the secular purpose of preserving the separation of church and state; that it did not have the primary effect of advancing or inhibiting religion because it permitted them to be independent of government support or sanction; that the exemption was, in fact, a neutral policy with respect to religious publications, notwithstanding the lack of exemptions for non-religious publications, and that the exemption actually minimized state entanglement with religion because it eliminated the necessity for government oversight of the content of religious publications. *Texas Monthly*, 489 U.S. at 6-7 (citing Texas Monthly, Inc. v. Bullock, 731 S.W.2d 160, 169 (Tex. Ct. App. 1987)). It also rejected the free press claim on the ground that a prior decision of the United States Supreme Court, Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987), should be read as prohibiting only taxes that are imposed solely on the press or targeted at a small group within the press. *Texas Monthly*, 489 U.S. at 7.

exemptions to laws of general applicability.[82] All six Justices in the plurality rejected that approach in favor of the Court's traditional "categorical" approach to First Amendment issues, and it is on this point, more so than any other, that they parted company with the dissenters.

For Justices Scalia, Kennedy, and Chief Justice Rehnquist, the disturbing aspect of the plurality's reasoning lay not in the breadth or narrowness of its approach to any specific factual question (such as the constitutionality of sales tax exemptions limited to religious publications), but in the "irrationality" of a constitutional analysis that makes no attempt to resolve inconsistencies among governing constitutional norms. Justice Scalia summarized the dissenters' position as follows:

> Today's decision introduces a new strain of irrationality in our Religion Clause jurisprudence. I have no idea how to reconcile it with *Zorach [v. Clauson]* (which seems a much harder case of accommodation), with *Walz* [*v. Tax Commission*] (which seems precisely in point), and with *Corporation of Presiding Bishop* [*v. Amos*] (on which the ink is hardly dry). It is not right—it is not constitutionally healthy—that this Court should feel authorized to refashion anew our civil society's relationship with religion, adopting a theory of church and state that is contradicted by current practice, tradition, and even our current case law.[83]

In the dissenters' view, the resolution of the tension among the clauses of the First Amendment is to be accomplished by interpreting the rules organically in light of their intended purposes and prior interpretation.[84] And thus, "[i]f the exemption comes so close

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82. *Texas Monthly*, 489 U.S. at 17. Justice Brennan's opinion summarized Texas' defense as follows:

> In defense of its sales tax exemption for religious publications, Texas claims that it has a compelling interest in avoiding violations of the Free Exercise and Establishment Clauses, and that the exemption serves that end. Without such an exemption, Texas contends, its sales tax might trammel free exercise rights, as did the flat license tax this Court struck down as applied to proselytizing by Jehovah's Witnesses in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). In addition, Texas argues that an exemption for religious publications neither advances nor inhibits religion, as required by the Establishment Clause, and that its elimination would entangle church and state to a greater degree than the exemption itself.

Texas Monthly, 489 U.S. at 17.

83. *Id.* at 45 (Scalia, J., dissenting).

84. *Id.* at 44-45. Justice Scalia wrote:

> If the purpose of accommodating religion can support action that might otherwise violate the Establishment Clause, I see no reason why it does not also support action that might otherwise violate the Press Clause or the Speech Clause. To hold otherwise would be to narrow the accommodation principle enormously, leaving it applicable to only nonexpressive religious worship. I do not think that is the law. Just as the Constitution sometimes requires accommodation of religious expression despite not only the Establishment Clause but also the Speech and Press Clauses, so also it sometimes permits accommodation despite all those Clauses. Such accommodation is unavoidably content based—because the Freedom of Religion Clause is content based.

Id.

to being a constitutionally required accommodation, there is no doubt that it is at least a permissible one" under *both* the Establishment and the Speech and Press Clauses.[85]

From a "structural" perspective, it is obvious that there is far more going on here than a simple dispute over the constitutionality of a sales tax exemption limited to religious publications. This dispute concerns, among other things:

1) the legitimacy of "categorical" analysis in the First Amendment context;[86]

2) the role played by categorization when the Court utilizes mutually exclusive categories within a specific clause or amendment to describe what can be argued to be variants of the same organic liberty;

3) the right and power of a legislature to relieve the burdens imposed on religious practice by specific, generally-applicable laws (e.g., sales taxes);

4) the right and power of the judiciary to relieve such burdens on a case-by-case basis; and

5) the "fairness" of such exemptions when viewed from the perspective of those ineligible to claim them.

The implications of these questions can be brought into clearer focus by examining the role characterization and categorical analysis played in the plurality's decision to strike the Texas sales tax exemption. All six Justices in the plurality employed categorical analysis, but each characterized the issue to be decided in strikingly different ways.

2. Characterization and Categorical Analysis: Which Clause Controls?—There are several ways in which the issues presented in *Texas Monthly* can be characterized. If viewed purely as a "First Amendment case," the available categories for analysis are speech and press, religion (non-establishment and free exercise), assembly (including association), and petition for redress. If, on the other hand, the case were viewed as arising under the Fourteenth Amendment (which "incorporates" the First), the options would also include liberty (including substantive due process and personal autonomy), equal protection, and "hybrid" (i.e., "all of the above"). Interestingly, *none* of the nine Justices discussed the Fourteenth Amendment.

a. Establishment or free exercise?—Five Justices (Brennan, Marshall, Blackmun, O'Connor, and Stevens) chose "religion" as the controlling category, even though the case also contained strong "speech and press" elements. Once categorized as a "religion case," the jurisprudence of the Religion Clause itself required another characterization—choice of the controlling sub-category, and hence, of the controlling norm: non-establishment or

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85. *Id.* at 42. *Accord id.* at 28 (Blackmun, J., concurring) ("Justice Scalia rightly points out . . . that the Free Exercise and Establishment Clauses often appear like Scylla and Charybdis, leaving a State little room to maneuver between them.").

86. *See also* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). There are a number of across-the-board questions which can be raised concerning the legitimacy of "categorical analysis," not the least of which is how to reconcile a more integrated approach with existing case law. Discussion of these topics is largely beyond the scope of this Article.

free exercise.

Texas Monthly was a difficult case because Texas argued that the tax exemption was justified as an accommodation of the religious publishers' rights under the Free Exercise Clause. *The Texas Monthly* argued that, whatever the result under Religion Clause analysis, the exemption was forbidden by the Speech and Press Clause. The Court thus faced what might be called a "true categorical conflict;"[87] one norm or the other would have to yield. It was on the question, "which one?," that the three opinions in the plurality parted company.

Justice Brennan announced the judgment of the Court in an opinion joined by Justices Marshall and Stevens. Its sole focus was the relationship between the Establishment Clause claims made by *The Texas Monthly* and the free exercise interests the State of Texas sought to protect by the sales tax exemption.[88] No attempt was made to discuss the free speech implications of the controversy,[89] to strike a balance between free exercise and the non-establishment concerns, or to reconcile the apparently disparate requirements of the three constitutional norms alleged by the parties to be controlling.

Justice Blackmun, joined by Justice O'Connor, dealt at some length with the relationship among the three lines of authority and the conceptual difficulty of the structural task of reconciling them; yet, he was troubled by the substantive implications of resolving them in the manner suggested by either Justice Brennan (limiting the scope of the free exercise norm) or Justice Scalia (limiting the categorical nature of both non-establishment and speech analysis). Justice Blackmun suggested that it might be wiser for the Court to "avoid most of these difficulties with a narrow resolution of the case."[90]

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87. Apologies to the late Professor Brainerd Currie, who coined the term "true conflict" to describe a choice-of-law problem in which the interests or policies of two jurisdictions are irreconcilable. In such a situation, one will, of necessity, be subordinated to the other. In that situation, it is incumbent on the court which is to make the choice to attempt "a more moderate and restrained interpretation of the policy or interest of one state or the other," in an attempt to avoid the conflict. Brainerd Currie, *Comments on* Babcock v. Jackson, 63 COLUM. L. REV. 1233, 1242-43 (1953), *quoted in* LEAH BRILMAYER & JAMES MARTIN, CONFLICT OF LAWS 222-35 (3d ed., 1990).

88. *Texas Monthly*, 489 U.S. at 15.

> [W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community.

Id. (quoting Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 348 (1987)) (citation omitted).

89. *Id.* at 5. "We hold that, when confined exclusively to publications advancing the tenets of a religious faith, the exemption runs afoul of the Establishment Clause; accordingly, we need not reach the question whether it contravenes the Free Press Clause as well." *Id.*

90. *Id.* at 28 (Blackmun, J., concurring).

> I believe we can avoid most of these difficulties with a narrow resolution of the case before us. We need not decide today the extent to which the Free Exercise Clause requires a tax exemption for the sale of religious literature by a religious organization; in other words, defining the ultimate scope of *Follett* and *Murdock* may be left for another day. We need decide here only whether a tax exemption *limited to* the sale of religious literature by religious organizations violates the Establishment Clause.

The disagreement among these five Justices was focused on whether it was possible (or desirable) to avoid a head-on collision between the Establishment and Free Exercise Clauses. Justices Brennan, Stevens, and Marshall saw a categorical conflict and resolved it by holding that the Establishment Clause limits the permissible scope of Free Exercise Clause claims to cases of empirically demonstrable, "concrete," *individual* need.

> "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." In this case, the State has adduced no evidence that the payment of a sales tax by subscribers to religious periodicals or purchasers of religious books would offend their religious beliefs or inhibit religious activity. The State therefore cannot claim persuasively that its tax exemption is compelled by the Free Exercise Clause in even a single instance, let alone in every case. No concrete need to accommodate religious activity has been shown.[91]

This, however, was the precise categorical conflict—and the result—that Justices Blackmun and O'Connor sought to avoid when they suggested that the Court consider a theory permitting a "narrow[er] resolution of the case."[92] Because they agreed with Justice Brennan that the ultimate question to be decided was "whether a tax exemption limited to the sale of religious literature by religious organizations violates the Establishment Clause,"[93] the only way to avoid the conflict was to reserve for decision in a later case "the extent to which the Free Exercise Clause *requires* a tax exemption for the sale of religious literature by a religious organization."[94] This characterization of the issues would have preserved the possibility that the Free Exercise Clause might be construed to require a "religious exemption" in a very limited class of cases. Such a characterization of the "reserved" free exercise issue would also enable the Court to characterize the non-establishment issue before them as one of discretionary financial assistance to religion, unsullied by free exercise concerns.

By focusing on *Follet v. McCormick*[95] and *Murdock v. Pennsylvania*,[96] and deferring decision on "the ultimate scope of [those cases] . . . [to] another day,"[97] Justices Blackmun and O'Connor unwittingly underscored the futility of their attempt to develop "narrowing" characterizations. *Murdock* makes it clear that the activity involved—sale and distribution of religious tracts—is "a combination of both" preaching (which is both "pure" speech and religion) and the distribution of literature (which is both religion and press). As a "hybrid" activity (to borrow a phrase from *Smith*[98]), "[i]t has the same claim to protection

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Id.

91. *Id.* at 18 (citation omitted).

92. *Id.* at 28.

93. *Id.* Justice Brennan's formulation focused on whether sales tax exemptions "confined exclusively to publications advancing the tenets of a religious faith, . . . run[] afoul of the Establishment Clause." *Id.* at 5.

94. *Id.* at 28 (Blackmun, J., concurring) (emphasis added).

95. 321 U.S. 573 (1944).

96. 319 U.S. 105 (1943).

97. *Texas Monthly*, 489 U.S. at 28.

98. Employment Div. v. Smith, 494 U.S. 872, 882 (1990).

as the more orthodox and conventional exercises of religion" as well as "the same claim as the others to the guarantees of freedom of speech and freedom of the press."[99] As a result, the only way to "narrow" *Texas Monthly* in the manner suggested by Justices Blackmun and O'Connor is to isolate its free exercise and speech components from those which sound in non-establishment. This could only have been accomplished by focusing on the action of the state (granting a tax exemption) *without regard to its intended purpose*.[100]

Viewed from an "establishment only" perspective, it is possible to characterize the case as one involving only a tax exemption limited to religious publications. The problem with such a device is its obviousness. Current standards under *both* components of the Religion Clause[101] and the Equal Protection Clause[102] require an examination of the policy's intended purpose. Under the formulation suggested by Justices Blackmun and O'Connor in *Texas Monthly*, however, an inquiry into both the purpose and effect of the tax exemption on the interests of others—most notably the religious groups which will lose their exemption and the press organizations which are ineligible to claim it—does not appear to be necessary.[103] The *individual* liberty interests at stake, including free exercise, free press, and, arguably, equal protection, simply drop out of the picture. Small wonder that none of the other seven Justices viewed the approach as a viable one.

b. Religion or speech and press?—Justice White also employed categorical analysis to strike the Texas tax exemption. Ignoring the Religion Clause altogether, he held that the tax exemption was invalid under the Speech and Press Clause because it was content-based.[104] Though he did not elaborate further, it is clear from his vote to strike the exemption that he rejected Texas' claim that content-based discrimination can be justified on free exercise grounds. For Justice White, the "categorical" conflict was between the norms that guarantee free exercise and those which guarantee free speech and press.[105]

3. The Structural Implications of Categorical Analysis.—

a. What is the judicial role?—Perhaps the most important information contained in the four opinions in *Texas Monthly* is an insight into the Justices' views concerning the Court's role when faced with controversies involving alleged conflict among the clauses of the incorporated First Amendment. The position of Justices Scalia, Kennedy, and Chief Justice Rehnquist is fairly clear on this point: the Court's role is limited to interpretation. It must read the Constitution as an organic whole and avoid the temptation to utilize categorical analysis in a manner that permits it to fine-tune the public policy which governs "our civil society's relationship with religion."[106]

Justice White appears to view the substantive norms contained in the First

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99. *Murdock*, 319 U.S. at 109.

100. For a discussion of the relevance of "intent" or "purpose" to First Amendment litigation, see *infra* notes 241-46 and accompanying text.

101. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993); Lemon v. Kurtzman, 403 U.S. 602 (1971) (prongs 1 and 2 of the "three pronged test").

102. Washington v. Davis, 426 U.S. 229 (1976).

103. This view appears to be at odds with the positions taken by both Justices in *Smith*.

104. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 26 (1989) (White, J., concurring).

105. *Cf.* Widmar v. Vincent, 454 U.S. 263, 283-84 (1981) (White, J., dissenting).

106. *Texas Monthly*, 489 U.S. at 45.

Amendment as discrete, categorical rules that determine the legitimacy or illegitimacy of governmental conduct.[107] His opinion was short because his view of the constitutional norm governing "speech cases" is clear: *laws may not discriminate on the basis of the content of "protected" speech.*[108] Because the category chosen (e.g., "protected," "unprotected," speech, religion) drives the analysis,[109] his vision of the Court's role in First Amendment cases can only be discerned on a category-by-category basis. In Religion Clause cases, he has made it clear that he favors a relatively inactive judicial role.[110] With respect to virtually all cases stating a claim under the Speech and Press Clause (i.e., those involving "protected" speech), the role is an active one.[111]

Justices Brennan, Marshall, Stevens, Blackmun, and O'Connor also take a categorical approach to the First Amendment. After *Texas Monthly*, it appears that their view of the relationship of the Establishment Clause to the Free Exercise Clause is governed by the following norm: *no aid or accommodation for religion is permitted by the Establishment Clause unless it is judicially determined to be required by the Free Exercise Clause.* Because they view the Establishment and Free Exercise Clauses as being in "tension" with one another, it follows that the judicial role is an active one across-the-board. The highly categorical "three-pronged test" enunciated in *Lemon v. Kurtzman*,[112] and modified over the years by Justice O'Connor's "endorsement" analysis,[113] provides clearly articulated rules which set the boundaries for permissible governmental accommodation of religious believers and institutions—and thus, the outer limits of the Free Exercise Clause itself.

Their approach on free exercise questions is only slightly less categorical. Here, however, the focus for Justices Brennan, Marshall, Blackmun, and O'Connor appears to

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107. In R.A.V. v. City of St. Paul, 505 U.S. 377, 400 (1992) (White, J., concurring), Justice White, with whom Justices Blackmun and O'Connor joined, stated that "[t]he categorical approach is a firmly entrenched part of our First Amendment jurisprudence." *See also id.* at 421-23 (Stevens, J., concurring).

108. *Id.* at 399.

109. The "categorical approach" suggested by these Justices is not unlike the practice of characterization in the choice of law process. Because the *Restatement (First) of Conflict of Laws* resolved conflicts by reference to a set of jurisdiction selecting rules, it was necessary to determine the category (torts, contract, etc.) under which the particular choice-of-law problem should be solved. *See generally* DAVID H. VERNON ET AL., CONFLICT OF LAWS: CASES MATERIALS AND PROBLEMS 247-70 (1990). "Modern" choice of law theory, by contrast, rejects a "categorical approach" in favor of what might loosely be termed a "multi-factor interests analysis," which seeks to determine the nature of the sovereign interests involved, and the degree to which they might be affected by the factual and legal setting of a particular case. The Court's approach to deciding First Amendment cases appears to mirror the hybrid approach to modern choice of law theory taken by the *Restatement (Second) of Conflict of Laws* in cases involving the selective incorporation of the Bill of Rights, and a "pure" interests analysis of the sort exemplified by Professor Leflar's "Better Rule" approach when it decides cases under the rubric of substantive due process.

110. Widmar v. Vincent, 454 U.S. 263, 283-84 (1981) (White, J., dissenting) (taking issue with the Court's characterization of prayer as "religious speech" and recounting his problem with the Court's jurisprudence under the Religion Clause).

111. *R.A.V.*, 505 U.S. at 399 (White, J., concurring) (applying a similar "categorical" approach to "hate speech").

112. 403 U.S. 602, 614 (1971).

113. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

be the "fundamental" nature of the right and the "minority" status of the individual raising the religious liberty claim in the political community that made the decision at issue.[114] These questions are, by their very nature, fact-sensitive, and presuppose a searching judicial inquiry.

The difficulty of the structural problems inherent in categorical analysis troubled Justices Blackmun and O'Connor in *Texas Monthly*.[115] Though they rejected Justice Brennan's overt subordination of the Free Exercise Clause to non-establishment concerns, they were also concerned that Justice Scalia's approach tipped the balance too far in the other direction:

> The Texas statute at issue touches upon values that underlie three different clauses of the First Amendment: the Free Exercise Clause, the Establishment Clause, and the Press Clause. As indicated by the number of opinions issued in this case today, harmonizing these several values is not an easy task.

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114. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 909-19 (1990) (Blackmun, J., dissenting); *id.* at 902-03 (O'Connor, J., concurring); Board of Educ. v. Mergens, 496 U.S. 226 (1990) (Marshall, J., concurring); Goldman v. Weinberger, 475 U.S. 503, 513 (1986) (Brennan, J., dissenting).

Justice O'Connor's "endorsement" analysis focuses almost exclusively on the impact of perceived endorsement of religion on the most discrete and insular members of the political community, but stops short of creating what might be termed a "dissenter's veto" by imposing an "objective observer" standard. It remains unclear, however, just what specific criteria the "objective observer" is permitted to take into account. Justice Kennedy, for example, has noted that "[a]lthough Justice O'Connor disavows Justice Blackmun's suggestion that the minority or majority status of a religion is relevant to the question whether government recognition constitutes a forbidden endorsement, . . . the very nature of the endorsement test, with its emphasis on the feelings of the objective observer, easily lends itself to this type of inquiry." *ACLU*, 492 U.S. at 677 (Kennedy, J., concurring in part and dissenting in part). Justice O'Connor herself has indicated that questions of this sort require sensitive judicial inquiries into social fact. *See* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 345, 348 (1987) (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 693-94 (1984) (O'Connor, J., concurring). The minority or majority status of the religion would certainly be relevant to such an inquiry, even if, in the end, it was not determinative.

Alone among the Justices, Justice Stevens does not appear to be particularly sympathetic to the claims of religious minorities. Not only has he consistently questioned both the under-inclusiveness and over-inclusiveness of the Court's definition of the term "minority" (*see* Fullilove v. Klutznick, 448 U.S. 448, 552-53 & n.30 (1980)), he has made it clear that government endorsement of religion, or lack of neutrality when faced with "partisan ideology" (which, for him, includes religion), should be the Court's primary concern. *See Mergens*, 496 U.S. at 280-81 & 282 n.16 (Stevens, J., dissenting); *ACLU*, 492 U.S. at 649 (Stevens, J., concurring). On occasion this may mean no accommodation for religion at all. *See Goldman*, 475 U.S. at 513 & n.6 (1986) (Stevens, J., concurring).

115. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 28 (1989) (Blackmun, J., concurring) "Accordingly, *whether or not Follett and Murdock prohibit taxing the sale of religious literature*, the Establishment Clause prohibits a tax exemption limited to the sale of religious literature." *Id.* (emphasis added).

To acknowledge that a potential conflict between and among several constitutional provisions might exist, and yet hold that one of these provisions is controlling, without explaining why, is not "analysis." More importantly, it is not organic judicial review of the sort contemplated in either Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), or McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

> . . . .
>
> It perhaps is fairly easy to reconcile the Free Exercise and Press Clause values. . . .
>
> I find it more difficult to reconcile the Free Exercise and Establishment Clause values. . . .
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> Justice Brennan's opinion . . . would resolve the tension simply by subordinating the Free Exercise value, even, it seems to me, at the expense of longstanding precedents. . . . Justice Scalia's opinion, conversely, would subordinate the Establishment Clause value.[116]

The relationship of "structure" to interpretive substance could not be more clearly expressed, but the tendency to focus on the interpretive questions obscures consideration of those which relate to the power of the Court. The interpretive problem presented in *Texas Monthly* is indeed a difficult one, but it is a difficulty largely of the Court's own making. The Court's adoption of a categorical approach is a logical outcome of its decision to incorporate the Bill of Rights "selectively,"[117] but it would be a stretch to assert that such an approach is compelled by a reading of the constitutional text. The Court simply made a series of policy choices, and glossed over many of the structural and interpretive difficulties inherent in these clauses.

The Religion Clause is perhaps the clearest case in point. There was no tension between the Free Exercise and Establishment Clauses before *Cantwell v. Connecticut*[118] because there were few, if any, occasions to "balance" them against one another. The Court's categorical approach of applying two express limits on congressional authority to the states via the Due Process Clause of the Fourteenth Amendment lies at the root of the interpretive difficulty. Had Justices Blackmun and O'Connor pursued their line of reasoning any further, they might have turned to a discussion of what the "values" which animate each of the incorporated provisions *are*. Only then would it be truly possible for the public to determine why "it is fairly easy to reconcile the Free Exercise and Press Clause values," but it is much more difficult for a judge to reconcile the values of the Establishment and Press Clauses.

Texas Monthly is the logical outcome of an approach to religious liberty issues that views the Court as the one branch of government which possesses the constitutional authority to "distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other."[119] There is an inherent tension between the political resolutions reached in disputes between the state and

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116. *Texas Monthly*, 489 U.S. at 26-27 (Blackmun, J., concurring).

117. Mary Glendon and Raul Yanes have pointed out that a large part of the current confusion about the nature of the religious liberty guarantee is traceable to Justice Benjamin Cardozo's defense of selective incorporation in Palko v. Connecticut, 302 U.S. 319 (1937). Glendon & Yanes, *supra* note 17, at 479. By rejecting wholesale incorporation of the entire Bill of Rights, *Palko* necessarily adopts the view that there is "an implied hierarchy of constitutional values." *Id.* It also necessarily implies that it is the task of the Supreme Court to discern both the identity and relative position within that hierarchy of the rights identified as "fundamental." *Id.*

118. 310 U.S. 296 (1940).

119. Locke, *supra* note 70, at 80.

believers over the two centuries of this nation's existence and the content of the norms the Court has developed. Justice Blackmun, with whom Justice O'Connor joined, clearly recognized that fact in his opinion; and it unquestionably affected his conclusion concerning the rule to be applied in the case. Yet he sought to avoid resolving it because long-standing precedent (and, hence, the Court's credibility) might be called into question as a result. Therefore, even though he agreed with Chief Justice Rehnquist, and Justices Scalia, and Kennedy that a more organic approach to constitutional interpretation is necessary, he refused to embark on the process of applying it.[120]

By contrast, neither Justice White nor Justice Brennan appeared to be concerned about the tension between structure and content. Though his opinion is silent on the topic, Justice White's vote to strike the tax exemption leaves little doubt that he did not view the Free Exercise Clause as a justification for content-based discrimination.[121] The same is true with respect to the opinion of Justice Brennan, which simply assumes that the Establishment Clause is a structural limit on the reach of the Free Exercise Clause.[122] Their "categorical" logic is both clear and inexorable.

b. What is the legislative role?—The significant point for this writer is that all of the opinions (including that of Justice Scalia) ignore the impact of the Fourteenth Amendment. Not only is the Fourteenth Amendment the source of the Court's power to incorporate the Bill of Rights and apply it to the states, but it is also an important source of *legislative* authority to protect the rights of citizens and others within the jurisdiction of the United States.[123]

None of the six Justices accepting the categorical approach in *Texas Monthly* make any attempt to explain why a categorical analysis is either a necessary or proper approach to defining the "liberty" protected by the Due Process Clause of the Fourteenth Amendment if the result will be a "true conflict" among the clauses of the incorporated First Amendment. A "more moderate and restrained approach"[124] to constitutional interpretation is required if Congress and the state legislatures are to have any meaningful authority of their own. For this reason, it is the obligation of the Court to make sense of these overlapping protections of individual liberty.

If, as the Court holds in *Texas Monthly*, the Establishment Clause limits permissible

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120. For an illuminating discussion of the role of stare decisis in such circumstances, see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2247-50 (1993) (Souter, J., concurring in part and concurring in the judgment); Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

121. Justice White does, however, appear to view the Establishment Clause as a justification for content-based discrimination against speech which can also be characterized as "prayer." *See* Widmar v. Vincent, 454 U.S. 263, 283-84 (1981) (White, J., dissenting).

122. Justices Brennan and Marshall also appear to view the Establishment Clause as a structural limit on freedom of speech. Board of Educ. v. Mergens, 496 U.S. 226, 264 (1990) (Marshall, J., concurring) (noting that the Court had "addressed at length the potential conflict between toleration and endorsement of religious speech in *Widmar*"). This position has been echoed in the recent opinions of Justices Souter, Breyer, Stevens, and Ginsburg. *See* Rosenberger v. Rector & Visitors of the Univ. of Virginia, 115 S. Ct. 2510, 2535 (1995) (Souter, J., dissenting, joined by Breyer, Stevens, JJ.); Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2475 (1995) (Ginsburg, J., dissenting); *id.* at 2469 (Stevens, J., dissenting).

123. See *infra* notes 164-70 and accompanying text.

124. *See supra* note 86.

free exercise claims to those in which a claimant can prove to the satisfaction of a judge a "concrete need to accommodate religious activity," the Court has struck an important interpretive and structural balance which tips the power to control the content of religious liberty policy to the judicial department. After *Texas Monthly*, judges, rather than legislatures, decide how the substantive balance should be struck between and among interests which might loosely be described as those "concerned about religion" and those which are "concerned about speech and press."[125] Why this balance is struck with respect to religion and not, for example, with respect to speech or race is neither explained nor defended.[126] Nor is any attention given to the important (and practical) vagueness problems inherent in its own formulations. Just what kinds of needs the Court might consider to be "concrete" (enough to pass constitutional muster) is anyone's guess.

The Court's categorical approach to the incorporation and interpretation of the religious liberty norms of the First Amendment gives little, if any, guidance whatsoever to lower court judges or administrators on how particular balances should be struck. Terms such as "concrete need" and "sensible balance" confer immense discretion on Article III judges—a discretion which would not be tolerated in the First Amendment context for anyone else were the issue one of freedom of speech or the press. The language and history of the First and Fourteenth Amendments make it doubtful that this was the power allocation Congress and the state legislatures intended when these Amendments were ratified.

If the Court has identified both freedom of the press and freedom of religion as rights "implicit in the concept of ordered liberty," and if the Court alone is empowered by the Due Process Clause of the Fourteenth Amendment to strike unreviewable balances between these rights (which is certainly debatable),[127] the "province and duty of the judicial department to say what the law is"[128] necessarily includes the responsibility to minimize interpretative inconsistency by construing the Constitution as an organic whole. Just as Article VI requires the states, Congress, and the executive branch to acknowledge (and respect) relevant text and precedent as they formulate policy (or plead their respective cases), so too must the Court.[129] When there appears to be an irreconcilable conflict, it is the duty of the Court to resolve it in a manner consistent with the view that it is a constitution and not a code that the Court is expounding.

c. Employment Division v. Smith: Whither free exercise?—If viewed from a structural perspective, *Employment Division v. Smith* is, in many respects, the mirror image of *Texas Monthly, Inc. v. Bullock*. The Free Exercise Clause figures prominently in both cases and the assertion is that the values it protects should be taken into account in the administration of laws of general applicability. Yet, only *Smith* is formally

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125. These interests overlap in significant ways, and I do not mean by the characterization chosen in the text to suggest that they are necessarily at odds.

126. *Cf.* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

127. *See infra* text accompanying notes 144-59.

128. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

129. Alexander Hamilton supplied the most compelling reason for the rule: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . ." THE FEDERALIST No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

characterized as a "free exercise" case, even though the structural and interpretive questions which lie at the heart of both cases are closely related.

The commentary critical of *Smith* has primarily focused on the interpretive question of whether the command of the Free Exercise Clause was correctly construed.[130] However, the structural question: "On whom does the Constitution confer the power to create, and enforce, 'religious exemptions?'" is either not discussed, or it is glossed over in a rather cursory fashion. For present purposes, this is the structural question that is important. On what division of government *does* the Constitution confer the power to grant, and enforce, "religious exemptions" from laws of general applicability? In *Texas Monthly,* a majority of the United States Supreme Court wrote that the answer is generally, "the Court." In *Smith*, the majority indicates that the answer is, at least in certain cases, "the legislature."

(i) Characterization and the facts of Smith.—Because there are several ways in which to characterize the legal issue before the Court in *Employment Division v. Smith*, it is useful to recount the relevant facts before exploring the manner in which the case should be characterized.

Alfred Smith and Galen Black were drug and alcohol counselors employed by a private, nonprofit substance abuse treatment organization called "ADAPT." Both had former drug and alcohol dependencies, and in accordance with its treatment philosophy, ADAPT required its recovering counselors to agree to abstain from alcohol and non-prescription drugs as a condition of employment. Smith and Black did so, notwithstanding their membership in the Native American Church.

When ADAPT learned that Smith and Black had, on one occasion, used a small amount of peyote for sacramental purposes during a Native American religious ceremony, it fired them. In response, Smith and Black filed claims for unemployment benefits and a charge of religious discrimination under Title VII of the Civil Rights Act of 1964.[131] Notwithstanding the religious nature of the peyote use, the unemployment claims were rejected by the Oregon Employment Division on the grounds that the use of peyote was work-related misconduct. This decision was affirmed by the United States Supreme Court. The Title VII claims, on the other hand, were successfully pursued by the United States Equal Employment Opportunity Commission, and resulted in the entry of a federal consent decree, the terms of which provided that Smith and Black were to be rehired and that ADAPT would no longer consider the religious use of peyote by Native American Church members to be work-related misconduct.[132]

Given these facts, the case may be characterized in several plausible ways under federal statutory and constitutional law:

1) An individual rights case, insofar as the employer and the State of Oregon interfered with the privacy and liberty of Messrs. Smith and Black.

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130. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2247-50 (1993).

131. 42 U.S.C. § 2000e-2 (1988).

132. The federal consent decree is reprinted in Appendix A to Respondents' Brief in Opposition to Petition for Writ of Certiorari, Employment Div. v. Smith, 489 U.S. 1077 (1989) (No. 88-1213).

2) A religious liberty case, to the extent that the policies of the employer and the State of Oregon intentionally interfered with, or inadvertently placed burdens upon, the religious beliefs or practices of Messrs. Smith and Black.

3) A Free Exercise Clause case, insofar as the application of the unemployment compensation policies of the State of Oregon would inhibit sacramental use of peyote by members of the Native American Church.

4) An Equal Protection Clause case, to the extent that it could be proven that the State of Oregon's refusal to accommodate the use of peyote in Native American religious church services was a manifestation of an invidiously discriminatory intent to deprive Native Americans of equal treatment under the law.

5) An Establishment Clause or religious discrimination case, to the extent that the State of Oregon was not even-handed in either the letter or the application of its civil and criminal laws to various classes of religious believers; specifically between those eligible to receive special exemptions because their conduct was religious in character or motivation, and those whose conduct was not. This was the situation in *Texas Monthly*, and it was raised, albeit late in the proceedings, by Messrs. Smith and Black.

6) A religious discrimination in employment case, insofar as ADAPT failed to comply with Title VII's requirement that employers "reasonably accommodate" the religious needs of their employees, or singled out adherents of the Native American Church for differential treatment.

7) An American Indian religious liberty case, to the extent that federal law governing American Indians is either relevant or controlling.

8) A criminal law matter, to the extent that the behavior at issue (use of peyote, regardless of the circumstances) is a criminal offense under Oregon law.

9) A separation of powers and federalism case, to the extent that the issue to be decided is one of deciding *which* division of government shall strike the balance between individual religious liberty interests and the community's interest in the uniform enforcement and application of laws of general applicability.

Based on the issues presented, the factual setting in *Smith* presented far more than a Free Exercise Clause question. It could just as easily (and plausibly) have been characterized in any of the terms described above. The present question is how the appropriate characterization should be chosen.

(ii) Characterizing the constitutional issues presented in Smith.—Assuming, for present purposes, that it is preferable to avoid constitutional issues when possible, the analysis should begin with any relevant statutory provisions which would govern its outcome. To the extent that the underlying statute is valid, such an approach would

transform a case like *Smith* from a "First Amendment" case into a statutory one. Two statutes were available which would have served this purpose: Title VII of the Civil Rights Act of 1964, which governs the question of termination and backpay, and the American Indian Religious Freedom Act (AIRFA).[133]

Because Messrs. Smith and Black were reinstated and awarded backpay under Title VII, those aspects of their religious liberty interests were fully vindicated by a statutory remedy. The only remaining religious liberty issue left for the Court to decide in *Smith* was the power of the State of Oregon to deny unemployment compensation for the time they were without jobs. Thus, for present purposes, the issue is whether the constitutional issue could be characterized as a statutory one.

AIRFA does not speak directly to the issue. It provides that:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites. [134]

Given what appears to be a series of unequivocal congressional statements that native people shall be permitted, among other things, "access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites," it could be argued that preemption analysis would have been appropriate. Congress had enacted a series of laws that, when read together, enunciated a policy which addressed the issue of peyote in "ceremonials and traditional rites."[135] The Supreme Court, however,

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133. 42 U.S.C. § 1996 (1988).

134. *Id.* The Act further provided that:

> The President [shall] direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders to determine changes necessary to preserve Native American religious cultural rights and practices and report back to Congress 12 months after Aug. 11, 1978.

Id. note (Federal Implementation of Protective and Preservation Functions Relating to Native American Religious Cultural Rights and Practices; Presidential Report to Congress). This report was released in August 1979. *See* FEDERAL AGENCIES TASK FORCE, U.S. DEP'T OF INTERIOR, PUB. NO. 95-341, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT (1979).

135. *See* Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, 25 U.S.C. §§ 2401-55 (1994); American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1988); Native American Church v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979). Schedule I of the Controlled Substance Act, 21 U.S.C. § 812(c) (1994) contains an exemption for the sacramental use of peyote. 21 C.F.R. § 1307.31 (1995). In fact, the Oregon Supreme Court had rested its holding in support of Smith and Black's federal free exercise claim on its view that *Congress* had determined that peyote use by the Native American Church is constitutionally protected. *See* Smith v. Employment Div., 763 P.2d 146, 149 (1988). The State of Oregon, however, was not sure what weight it should be given.

A discussion of the Indian law aspects of this policy are beyond the scope of this Article, but it is painfully obvious that neither the states nor the federal government take their respective obligations under this provision very seriously. Given the federal government's virtual abdication of oversight authority respecting tribal

disagreed.

In *Lyng v. Northwest Indian Cemetery Protective Ass'n,*[136] the Supreme Court held that AIRFA's policy statement was "without teeth," and it made no mention of the possibility that a preemption analysis might be as appropriate in the Indian law context as it is in the Commerce Clause setting. In the Court's view, AIRFA was simply a statement of congressional resolve which assured that "the basic right of the Indian people to exercise their traditional religious practices [would not be] infringed *without a clear decision on the part of the Congress or the administrators that such religious practices must yield to some higher consideration.*"[137]

This is an interesting formulation indeed. The statute, as construed, does *nothing* of substance to foster religious liberty. It reserves Congress' non-delegable power to make decisions concerning the balance to be struck between federal programs and Native American religious needs—a task for which no statute was needed, and it creates no judicially enforceable rights.[138]

What the Court's construction *does* do, however, is quite interesting. It holds that Congress has delegated *to the executive branch agency charged with the administration of the relevant statute* the same power the Court claims for itself: the power to strike "sensible" balances between religious freedom interests and laws which do not contain explicit religious exemptions.

The Court in *Lyng* correctly perceived the generalized free exercise claim made by the Cemetery Protective Association as an attempt to constrain the apparently unfettered discretion of Congress and the executive branch to determine when Native American religious practices "must yield to some higher consideration."[139] It rejected the suggestion

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compliance with the Indian Civil Rights Act of 1978 (ICRA), 25 U.S.C. §§ 1301-02 (1994), it is not surprising that the federal government would argue that it was under no real obligation to apply AIRFA in a manner which would advance the protection of the religious liberty of individual adherents to Native American religions, especially if such an obligation would interfere with agency discretion.

136. 485 U.S. 439 (1988).

137. *Id.* at 455 (quoting 124 CONG. REC. 21444 (1978)) (emphasis added).

138. *Id.* at 455-57. *See also id.* at 471 (Brennan, J., dissenting) (agreeing that AIRFA creates no federal cause of action or judicially enforceable rights).

139. The Solicitor General's Brief in *Lyng* argued:

> The bill originally "requir[ed] Government agencies to implement changes in the law to accommodate religious practices of Indians where infringements have been identified." 124 Cong. Rec. 21444 (1978) (remarks of Rep. Udall); see also id. at 21451 (similar language in Senate bill). Representative Udall amended the bill to delete that language on the ground that the implementation of changes in the law "is the responsibility of Congress" (id. at 21444). Representative Udall explained that "[w]here administrative changes [to agency policies and procedures] can be made, consistent with the enabling legislation, to eliminate unwarranted restrictions on Indian religion, the bill intends that appropriate changes be made. Where the underlying law is determined to be the reason for such restrictions and where these restrictions are determined to be unwarranted and unnecessary, the bill contemplates that the President, in his report to the Congress, would request appropriate legislative changes." (ibid.).

Reply Brief for the Petitioners, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (No. 86-1013).

that it should supply guidelines for the exercise of administrative discretion as "incompatible with the text of the Constitution, with the precedents of this Court, and with a responsible sense of our own institutional role."[140] In the Court's view, religious freedom is nothing more than a "sensible balance." Insofar as Native American religious interests are involved, *Lyng* raised more important separation of powers questions than it did free exercise issues.

Why this is so is not immediately apparent. The text and structure of the Constitution certainly limit both congressional and executive branch discretion in matters relating to first amendment rights, and it is the very essence of the Court's "institutional role" to enforce those limits. The problem, to the extent that one exists, must lie in the Court's precedents concerning the nature and scope of religious liberty itself. With this background we turn to the question on which the Supreme Court granted certiorari in *Smith*: Does the Free Exercise Clause of the First Amendment to the United States Constitution protect a person's religiously motivated use of peyote from the reach of a state's general criminal law prohibition?

This question has two discrete components, one largely interpretive and the other largely structural:

> 1) Is the religious motivation (or objection) of an adherent whose belief or practice is burdened by otherwise constitutional, generally applicable law sufficient, standing alone, to invoke the protection of the Free Exercise Clause?
>
> 2) If so, how is that protection manifest?
>
> (a) Via judicial review of the facts of the particular case; or
>
> (b) Via the political process?

In *Lyng*, the Supreme Court held that a formulation of the free exercise norm which holds that the Free Exercise Clause "'is directed against *any* form of government action that frustrates or inhibits religious practice'"[141] was not acceptable because "[t]he Constitution . . . says no such thing. Rather, it states: 'Congress shall make no law . . . *prohibiting* the free exercise [of religion].'"[142] Thus, when the Court granted certiorari in *Smith*, the fault line within the Court on both the structural and interpretive issues had already been clearly sketched out in both *Lyng* and *Texas Monthly*. All that remained to be seen in *Smith* was whether the Court would adhere to the reasoning (and result) of *Reynolds v. United States*[143] or opt for the more expansive view of the free exercise norm urged by the dissenters in *Lyng*. Not surprisingly, the Court reaffirmed *Reynolds*.

(iii) Relating norm to structure: the limits of legislative power after Smith.—Because the majority opinion in *Smith* addresses both the content of the constitutional norm which has been incorporated by the Fourteenth Amendment and the role of the legislature in enforcing it, the Court's approach represents a significant departure from that taken in *Texas Monthly*. Given the uncertainty bred by such divisions within the Court, *Smith*

This was a point expressly argued by the United States, and rejected by the Native American Respondents.

140. *Lyng*, 485 U.S. at 456.

141. *Id.* (quoting the dissenting opinion of Brennan, J.).

142. *Id.* (quoting U.S. CONST. amend. I) (alteration in original).

143. 98 U.S. 145 (1878).

arguably makes the channel between the constitutional *Scylla* and *Charybdis* of religious liberty even smaller.

The majority opinion by Justice Scalia has a twofold focus. The first is the practical and theoretical problems which arise when judges attempt to craft exemptions to generally applicable laws. The second is the institutional competence and responsibility of the legislature to protect the rights of those who adhere to minority religious views. (The very point which appears to have influenced the Court in *Lyng*.)

Expressing confidence that "a society [which] believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well,"[144] the majority explicitly recognized that this may not always be the case.[145] In so doing, the majority implicitly rejected categorical analysis in free exercise cases. After *Smith*, "the *First Amendment* has not been offended" if generally applicable and otherwise valid legislation has the incidental (unintended) effect of "prohibiting the exercise of religion."[146]

The structural and substantive issues involved in *Smith* are thus virtually identical to those involved in *Texas Monthly*. The Court remained deeply divided over: 1) the balance of power to be struck between the judicial and legislative branches when there is a claim that a burden on religious liberty should be lifted; 2) the legitimacy of categorical analysis in First Amendment cases; and 3) the substantive meaning of the constitutional norms of the First and Fourteenth Amendments. In *Smith*, just as in *Texas Monthly*, the structural question is the important question because it will tell us *whose* vision of religious liberty is controlling. Once this question is answered, the substantive scope of religious liberty is more easily discerned.

We are now in the position to ask a question which mixes both structure and substance: After *Texas Monthly* and *Smith*, just how "solicitous of" religious liberty can legislators (or state judges) be? The answer is apparently—not very. *Texas Monthly* holds that the First Amendment *is* offended by exemptions which "benefit religion alone."[147] For at least five members of the Court prior to the appointments of Justices Souter, Thomas, Ginsburg, and Breyer, the only religiously-based exemptions from generally applicable laws which can survive review under the Establishment Clause are those where the state can prove that the proposed exemption both "remove[s] a demonstrated and possibly grave imposition on religious activity sheltered by the Free

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144. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

145. In an extraordinarily candid statement which brings together both the structural and normative aspects of these questions, Justice Scalia wrote:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Id. Justice Scalia's words take on added meaning when considered in light of James Madison's preference for a broadly-based, and highly factional, legislative arena as the place in which it is most likely that individual rights would be protected. For a discussion of this topic, see Destro, *supra* note 14.

146. *Smith*, 494 U.S. at 878 (emphasis added).

147. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 n.4 (1989).

Exercise Clause" *and* the exemption cannot "impose substantial burdens on nonbeneficiaries."[148]

For the majority in *Texas Monthly*, the *only* permissible religious exemptions from generally applicable laws are those carefully crafted to eliminate both "demonstrated and possibly grave impositions" on free exercise rights[149] and any "appreciable privation" that the exemption might have upon persons who cannot (or do not) claim them.[150] If the exemption in question might have a monetary impact on others, including taxpayers, or if it has some other characteristic which might result in its being perceived as an "endorsement" of religion, the exemption will be invalid.[151] After both *Lyng* and *Smith*, however, it appears that the opposite is true. Legislatures may single out religion for special exemptions to the extent they feel it is appropriate to do so.

Which rule applies? The answer is by no means clear as these words are written. If the overarching concern is to minimize social and legislative conflict over issues of religious tolerance, the "balancing" formulations favored by Justices O'Connor, Blackmun, Marshall, Brennan and, most recently, Justices Souter and Ginsburg, make eminent sense. They eliminate legislative conflict over the scope of religious liberty by holding that the operational effect of the incorporated First Amendment is judicial preemption of state and federal legislative authority to strike balances beyond those designed to address "concrete" individual needs.

If virtually all religious liberty claims are to be decided judicially on a case-by-case basis, the transfer of power over the question of religious liberty from the legislative departments of the states to the judicial branch of the federal government is virtually complete,[152] notwithstanding the Religious Freedom Restoration Act. At least insofar as the issue is religious liberty, the Ninth Amendment and Citizenship Clauses are rendered

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148. *Id.* at 18-19 n.8. *Accord id.* at 26 (Blackmun, J., concurring). Justice Souter appears to have cast his lot with the majority in *Texas Monthly*. *See* Lee v. Weisman, 505 U.S. 577, 609 (1992) (Souter, J., concurring). Justice Ginsburg also appears to side with the majority. *See* Board of Educ. v. Grumet, 114 S. Ct. 2481, 2487 (1994). Justice Thomas appears to have sided with the dissenters in *Texas Monthly*. *See Lee*, 505 U.S. at 631 (Scalia, J., dissenting, joined by Thomas, J.). Justice Souter also apparently believes the Court to have been wrong in *Smith*. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2247-50 (1993) (Souter, J., concurring in part and concurring in the judgment). Justice Thomas apparently agrees with *Smith*, at least insofar as it was applied by Justice Kennedy in the majority opinion in *Church of the Lukumi Babalu Aye, Inc.*

149. *Cf., e.g.*, Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (Brennan, J., concurring); Board of Educ. v. Mergens, 496 U.S. 226 (1990) (Marshall and Brennan, JJ., concurring in the judgment); *id.* at 270 (Stevens, J., dissenting).

150. *Texas Monthly*, 489 U.S. at 18-19 n.8 (opinion of Brennan, Marshall & Stevens, JJ.); *id.* at 26 (O'Connor & Blackmun, JJ., concurring in the judgment).

151. *Id.* Examples given were representative of a class of "legislative exemptions that did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs, or that were designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause." *Id.*

152. This, I suspect, is what Professor Lupu had in mind when he wrote that religious liberty claims should be justiciable only. *See generally* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991).

null.

This is a significant shift of power, but its true magnitude can only be seen by noting its impact on the power of Congress. To the extent that the Fourteenth Amendment worked a shift of power away from the states and the Court and into Congress, application of the *Texas Monthly* approach to federal legislation designed to protect religious liberty casts serious doubt on the continued vitality of the congressional "check" on judicial power built into the Amendment by its framers.[153] In this view of the free exercise norm, the role of the judiciary is to strike individualized balances between and among those whose religious freedom rights will be accommodated and those who are burdened or offended by the accommodation.

If, however, the interpretive task of the judiciary is to assure that religious liberty, like speech and press, is given the widest possible berth by both legislatures and administrators, these rules are senseless. After *Texas Monthly*, accommodation of free exercise rights via legislation is to be the exception rather than the rule, and even then the accommodation must be defended on the basis of "concrete need."[154] This is because the *Texas Monthly* construct has three main facets: a narrow definition of the free exercise norm, a broad definition of the non-establishment norm, and an active judicial role in assuring that the burdens lifted are "demonstrated," "grave," and "central" to religious belief or practice. Needless to say, the rules governing speech and press are considerably more expansive.

What of the first amendment right "to petition the government for a redress of grievances?"[155] After *Texas Monthly*, it means only one thing: if the grievance relates to religious liberty and the grievants can afford a lawyer, then they will be heard by an Article III judge. The irony of utilizing the First and Fourteenth Amendments to empower the judiciary in this fashion is exquisite.[156]

The majority in *Smith*, by contrast, expressly casts its lot with the "legislative department" and refuses to engage in the kind of case-by-case balancing analysis said to be required by *Sherbert v. Verner*,[157] *Wisconsin* v. *Yoder*,[158] and *Texas Monthly*. Justice Scalia actually goes out of his way to demonstrate why the analytical centerpiece of the plurality decision in *Texas Monthly* is wrong. It is significant that he does so in structural, rather than normative, terms:

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153. *See infra* notes 172-90 and accompanying text.

154. *Texas Monthly*, 489 U.S. at 18 & n.8. "No concrete need to accommodate religious activity has been shown." *Id.*

155. U.S. CONST. amend. I.

156. *Cf.* Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 199-201 (1992). On this point the Court appears to have drawn precisely the wrong conclusion from the career and vision of James Madison. Assuring constant and intense competition between and among factions, including those organized around religious matters, was the essence of Madison's structural proposals to assure that religious liberty was given wide berth at both the federal and state levels. *See* Destro, *supra* note 14, at 393-402 (arguing that the First Amendment is best viewed through the prism of Madison's political vision concerning the power of the state in matters of religion and conscience, rather than his philosophical views of the optimal relationship between church and state).

157. 374 U.S. 398 (1963).

158. 406 U.S. 205 (1972).

> Justice O'Connor contends that the "parade of horribles" in the text only "demonstrates . . . that courts have been quite capable of . . . strik[ing] sensible balances between religious liberty and competing state interests.". . . In any event, Justice O'Connor mistakes the purpose of our parade: it is not to suggest that courts would necessarily permit harmful exemptions from these laws (though they might), but to suggest that courts would constantly be in the business of determining whether the "severe impact" of various laws on religious practice (to use Justice Blackmun's terminology) or the "constitutiona[l] significan[ce]" of the "burden on the particular plaintiffs" (to use Justice O'Connor's terminology) suffices to permit us to confer an exemption. *It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.*[159]

Under *Texas Monthly*, the Establishment Clause leaves little room for legislatively mandated accommodation of free exercise rights. After *Smith*, there is no judge to whom one can complain of a Free Exercise Clause violation. Aside from a structural and doctrinal mess, what is left of free exercise?

I submit that both the supporters and the critics of the Court's decision in *Smith* are basically correct: The Supreme Court does not take religious liberty very seriously. Like Professor Bradley, I would argue that they have never done so, notwithstanding the *Sherbert-Yoder* line of cases.[160] Unlike Professor William Marshall, however, I do not view *Smith* as a welcome development.[161] It was, if anything, the logical result of the Court's unwillingness to continue to make case-by-case exceptions to its holding in *Reynolds*, but nothing more.

Read together, the decisions in *Texas Monthly* and *Smith* invite all who are concerned with the protection of religious liberty to think about the *kind* of religious liberty the incorporation doctrine actually incorporates. Is it limited to providing a judicial forum for citizens aggrieved by society's unwillingness to tolerate or accommodate the concerns of religious minorities, or is it a freedom which is every bit as essential to the maintenance of a pluralistic democracy as freedom of speech and press?

The question posed at the outset of this section—*To whom does the Constitution entrust the protection of religious liberty?*—cannot be answered in the abstract, for it has both structural and substantive components. If it is to be addressed at all—and the adoption of RFRA assures that it will be—the place to begin the inquiry is with the Court's interpretation of the Fourteenth Amendment.

III. Liberty, Democracy and the Mechanics of Incorporation

A. Which Clause?: Due Process or Privileges and Immunities?

We begin the first stage of this inquiry into the meaning of the Fourteenth

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159. Employment Div. v. Smith, 494 U.S. 872, 889 n.5 (1990) (citations omitted) (alteration in original).

160. *See generally* Bradley, *supra* note 51.

161. *See generally* Marshall, *infra* note 342.

Amendment with Justice John Paul Stevens' observation that the incorporation of the First Amendment by the Fourteenth is an "elementary proposition of law."[162] Given that starting point, the first question is not *whether* the First Amendment is incorporated, but *how*. The usual assumption is that the Due Process Clause of the Fourteenth Amendment provides the constitutional basis for applying the First Amendment to the states.[163] The alternative is to view all of the substantive federal guarantees that are not applicable to the states by force of the Constitution itself[164] as part and parcel of the "privileges or immunities of citizens of the United States."[165]

1. Due Process or Privileges and Immunities? The Structural Implications.—The structural implications of choosing a "due process" over a "privileges and immunities" mechanism for incorporating the Bill of Rights (selectively or *en masse*) are as significant as they are subtle. The rights protected by the Fourteenth Amendment "'go[] to the very nature of our Constitution'" and have "'profound effects for all of us'" as individuals.[166] This is so not only because of their substantive content, but also because the very existence of those rights presupposes a set of political relationships with equally "profound effects for all of us."

Although "'it is difficult to imagine a more consequential subject'" than the relationship of the Fourteenth Amendment to the Bill of Rights,[167] the structural questions which lie at the heart of the incorporation doctrine are often eclipsed by debates over the normative content of the rights incorporated. This is so, in part, because post-incorporation literature generally assigns the task of protecting individuals to the judiciary, the branch considered by many to be the "least dangerous" and most sympathetic to individual interests.[168]

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162. Wallace v. Jaffree, 472 U.S. 38, 49 (1985).

163. *See, e.g.*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1154 (2d ed. 1988).

164. *See, e.g.*, U.S. CONST. art. I, § 10, which includes, among other things, guarantees against bills of attainder and ex post facto laws, and which protects the creditors and parties to contracts from manipulation of tender and contract rights. *See also id.* art. III, § 2 (diversity jurisdiction as a means of preventing discrimination on the basis of citizenship); *id.* art. IV, §§ 2, 4 (Interstate Privileges and Immunities and republican form of government).

165. These would, of course, include the rights expressly guaranteed against the federal government as well. *See* Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1198-1203 (1992) (discussing the relationship between the general prohibitions of Article I, Section Nine, and the specific prohibitions of Article I, Section Ten (binding the states), and the First Amendment (binding Congress alone)).

166. *Id.* at 1194 (quoting Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 934 (1965)).

167. *Id.* (quoting William W. Van Alstyne, *Foreword* to MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS at ix (1986)).

168. It is notable, however, that the appellation "least dangerous" branch depends upon strict observation of the strictures of separation of powers. Alexander Hamilton, who coined the description, made it clear that "in a government in which [the different departments of power] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also id.* No. 71, at 433 (noting the "tendency of the legislative authority to absorb every other").

From a structural perspective, this is as it should be. The power to decide individual "cases or controversies" is the heart of Article III. More importantly, the majoritarian bias of the legislative branch makes it particularly unsuited to the task of protecting the interests of specific individuals and factions who are unable, for whatever reason, to gain protection in the normal course of the legislative process.[169] The "comparative competence and 'expertise'" of the judiciary in cases involving individual rights[170] is thus a structural attribute of Article III.

Congress, by contrast, is the body charged with the task of making laws conducive to the general welfare. Congress may adopt general legislation mandating the protection of individual rights to the extent that it is a necessary or proper means to attaining an otherwise legitimate goal. The power to make civil rights policy in fields subject to its jurisdiction is a "necessary and proper" attribute of the powers Congress was granted.[171]

When the issue is due process incorporation, however, the issue is no longer one of comparative competence and expertise; it is power. The foundation of due process incorporation is a claim that the Due Process Clause of the Fourteenth Amendment empowers the federal government to determine which liberties (including those contained in the Bill of Rights) are fundamental, and therefore bind the states, and which liberties are not.[172] If that claim of federal power is valid (the Court has held that it is), the *structural* question is whether the power to decide that a right is (or is not) fundamental

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Though Madison viewed the operation of factionalism within the legislative branch as one of the primary protections of the rights of individuals, he did not trust the legislature either. He warned:

> [I]n a representative republic where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

Id. NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961). Hamilton agreed. *See id.* No. 71, at 431-35 (Alexander Hamilton), No. 78, at 464-72 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

169. *Cf.* U.S. CONST. art. I, § 9, cl. 2 (Writ of Habeas Corpus), cl. 3 (prohibiting Bills of Attainder and ex post facto laws).

170. WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 15 (5th ed. 1980) (citing HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 82 (2d ed. 1973)); Clifton McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 354, 360-61 (1966); MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 29-30 (1966).

171. *See, e.g.*, Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (religious discrimination under Title VII of the Civil Rights Act of 1964); Katzenbach v. McClung, 379 U.S. 294 (1964) (race discrimination); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (public accommodations).

172. A structural analysis makes it clear that both Congress and the states are free to protect rights which the Court does not deem to be fundamental—as long as they respect the boundaries set by separation of powers and federalism. Though these structural concerns are not generally viewed as devices for the protection of individual rights, both function as important "checks" on the exercise of political power.

belongs to Congress, to the Court, or to both.[173]

The fundamental nature of an interest or right is less significant in a privileges and immunities analysis. Although the phrase "privileges or immunities of citizens of the United States"[174] is not defined in the Constitution,[175] it is clear from both the usage of the phase in the 1860s and the text and structure of the Constitution itself that such interests need not be characterized as either "personal" or "fundamental" in order to merit protection.[176] Because some interests, such as those which flow from citizenship status or private contract, arise from and are legally defined by reference to an individual's relationship to a particular public or private community, the important question under the Privileges and Immunities Clause is whether the law defines a right as one attaching to a person's status as a citizen of the United States.[177]

The purpose of the Privileges and Immunities Clause of the Fourteenth Amendment is a straightforward one. Based on Article IV, Section Two of the United States Constitution,[178] the clause protects "citizens of the United States" in the same manner that the Interstate Privileges and Immunities Clause protects the "Citizens in the Several States:" it limits a state's ability to exclude from the protection of its internal law those it considers to be non-members of its body politic. Both provisions draw their content by reference to a larger body of positive law, and both recognize that certain rights and obligations flow from one's political status in a community. Both clauses are, in short, restraints that assume not only the existence of state power to protect and preserve the rights of citizens and strangers in the community, but also that lapses in the political will to use that power for its intended purpose are inconsistent with the general welfare of the United States.

This interpretation is confirmed by reading Article IV, Section Two, the Ninth and

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173. I use the term "federal government" here deliberately; for if the Due Process Clause is the source of federal authority to incorporate the Bill of Rights, the argument that the Constitution allocates the "incorporation" power to the judiciary alone must rest, if anywhere, in the doctrine of separation of powers.

174. U.S. CONST. amend. XIV, § 1.

175. Having held in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78 (1873), that "the privileges and immunities relied on in the argument are those which belong to citizens of the States as such," Justice Miller concluded that the Court "[might] hold [itself] excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so."

176. *See* Amar, *supra* note 165, at 1227-33, 1258-60. *Accord* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1874 (1995) (Kennedy, J., concurring).

177. The Interstate Privileges and Immunities Clause, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Contracts Clause, U.S. CONST. art. I, § 10, are examples of provisions designed to protect interests which are not accurately characterized as either "personal" in nature, or so "fundamental" as to be "implicit in the concept of ordered liberty." Rights and obligations of this type are best described as "community status rights." *See, e.g.*, Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978); Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978). Such interests are clearly distinguishable from "group rights." *See* LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 1050-1140 (1990). They are also distinguishable from what Professor Tribe describes as rights of "citizen autonomy." *See* TRIBE, *supra* note 163, at 546-59.

178. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (comments of Jonathan Bingham, draftsman of Section One).

Tenth Amendments, and the Privileges and Immunities Clause of the Fourteenth Amendment together with Article VI. These provisions explicitly recognize that the legislatures "in the several States" retain the power (if not the duty) to preserve, protect, and defend the rights of all within their respective jurisdictions. The power of Congress to protect and preserve the privileges and immunities of citizens of the United States, including their "fundamental rights," stands on the same footing. Congress clearly has the power under Articles I, III, IV, V and VI[179] to define the rights and obligations of American citizens, both at home and abroad.[180] The Court, however, has not always agreed.

In *Dred Scott v. Sandford*,[181] the Court interpreted Article IV[182] in a manner that negated the federalism it embodies. By reading the scope of congressional power over the territories narrowly, the Court gutted both the Missouri Compromise[183] and the power of Congress under Article IV, Section Three to adopt "all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." By permitting the Missouri Supreme Court to refuse to give effect to the law of Illinois governing the personal status and contractual capacity of those who resided in Illinois or entered into contractual relationships to be performed there,[184] the Court negated the cooperative federalism implicit in the Full Faith and Credit Clause.[185] The gutting of Article IV made it impossible for either Congress or the free states to protect the privileges and immunities of individuals living within their respective jurisdictions.[186]

The Citizenship, Privileges and Immunities, and Enforcement Clauses of the Fourteenth Amendment thus fill three gaps created by the Court's ruling in *Dred Scott*: they set a single standard for citizenship in the United States and in the several states; they confer unquestioned power upon the Congress to enact legislation designed to protect citizens of the United States; and, by conferring state citizenship as an incident of residency, they restore the power of the states to protect the civil and human rights of all

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179. *See, e.g.*, U.S. CONST. art. I, §§ 8, 10; *id.* art. III, § 2; *id.* arts. IV, V, VI.

180. *See* U.S. CONST. art. I, § 8, cls. 1, 3, 4, 5, 10, 17, 18; *id.* art. IV, § 3, cl. 2. A recent example of congressional action in the field is section 109 of the Civil Rights Act of 1991, PUB. L. NO. 102-166, 105 Stat. 1071. It was passed in response to the Supreme Court's opinion in EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991). The Act amends section 701(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (1988), and section 101(4) of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(4) (1988). It extends statutory protection to American citizens employed in foreign countries where the extraterritorial application of the law would not violate the sovereignty of the host nation. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402-03 (1986).

181. 60 U.S. (19 How.) 393 (1856).

182. U.S. CONST. art. IV, §§ 1, 3.

183. Act of Mar. 6, 1820, ch. 22, 3 Stat. 545; Act of Mar. 2, 1821, ch. 1, 3 Stat. 645.

184. Under controlling Illinois precedent, Dred Scott's employment by his master while both were living within the State of Illinois was an act which declared Dred Scott a free person and citizen of Illinois. Jarrot v. Jarrot, 7 Ill. (2 Gilm.) 1 (1845).

185. U.S. CONST. art. IV, § 1; *Dred Scott*, 60 U.S. (19 How.) at 555-58 (McLean, J., dissenting).

186. The dissenting opinion of Justice McLean contains a thorough discussion of the choice of law, comity, and sovereignty aspects of the decision. *Dred Scott*, 60 U.S. (19 How.) at 350-64.

persons who reside within their jurisdiction.[187]

Though there is no longer any doubt about persons who are entitled to the status of "citizen" in our national and state communities, there remains considerable doubt about which branch has the final word in defining the scope of the substantive rights enjoyed by citizens and others living within our national, state, and local communities.[188] Because the choice of an incorporation mechanism has significant separation of powers and federalism implications, there is no easy answer to this question.

The adoption of the Fourteenth Amendment left no doubt as to the power of Congress to protect the rights of citizens and others subject to the jurisdiction of the United States. Congress also has the additional power to enforce the Fourteenth Amendment against recalcitrant states and their officials. Because the Court has the power to interpret both the Amendment and laws enforcing it,[189] the contours of the separation of powers boundary between the Congress and the Court (including the existence of a "zone of twilight," if any) are important not only for structural reasons but also for historical reasons as well. The Reconstruction Congress, it should be remembered, neither trusted the Court nor viewed it as an ally in the struggle for equal rights. One of the primary goals of Sections One and Five of the Fourteenth Amendment was to undo the structural damage done by the Taney Court in *Dred Scott*.[190]

The same analysis holds true for the states. Not only do they have the power to protect the rights of citizens of the United States, the Ninth and Tenth Amendments reserve for them the power to protect and define rights beyond those enumerated in the Bill of Rights, whether the federal judiciary considers them to be fundamental or not. In a milieu where the Court is perceived to be either antagonistic or stingy in its interpretation of the law of individual rights, these are significant powers. Largely because federalism is not perceived to be a source of protection for individual rights,[191]

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187. The Missouri courts recognized this rule up to and including the *Dred Scott* case. In fact, a Missouri trial court ruled in Scott's favor. That decision, however, was overturned on appeal by the Missouri Supreme Court, which refused to concede the applicability of either federal law (the Missouri Compromise or the Northwest Ordinance) to the period when Scott lived in the Wisconsin and Minnesota territories, or of Illinois law to the period when Scott was employed by his former owner in that State. Under either law, employment in the jurisdiction operated as a manumission, and Scott would have become a citizen entitled to sue in a federal court.

188. Cases such as Plyler v. Doe, 457 U.S. 202 (1982) indicate that this issue arises in non-incorporation contexts as well.

189. In *Oregon v. Mitchell*, Justice Brennan dismissed inquiries into the source of the Supreme Court's power to enforce the Fourteenth Amendment as being "of academic interest only." 400 U.S. 112, 264 n.37 (1971). While this is not the precise question raised here, the Court's decision in *Katzenbach v. Morgan*, poses the separation of powers and federalism questions starkly. 384 U.S. 641 (1966). Both cases are discussed *infra* Part IV.

190. Raoul Berger notes, for example, that Senator Charles Sumner of Massachusetts was so incensed by Taney's decision in *Dred Scott* that he "sought to bar the customary memorial, placement of Chief Justice Taney's bust in the Supreme Court chamber, and insisted that his name should be 'hooted down in the pages of history.'" RAOUL BERGER, GOVERNMENT BY JUDICIARY 222 (1977) (quoting DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 193 (1970)).

191. In *United States v. Lopez*, Justice Kennedy noted that this is an "ironic" perception. "Because of the four structural elements in the Constitution just mentioned, federalism was the unique contribution of the Framers

neither the Court nor the commentators have explored the possibility that the explicit reservation of the power to expand upon the federal conception of rights contained in the Ninth Amendment is a potential limit on the preemptive power of Congress or the Court under the Fourteenth Amendment.[192]

At bottom, the answers to the federalism and separation of powers questions raised above determine whether the judicial process, by which fundamental rights are defined, limited, or balanced against other important social interests, is subject to any meaningful restraint via the democratic process aside from impeachment. More specifically, the structural implications of the First Amendment are "First Amendment questions" in their own right. The Amendment guarantees to each of us, individually and collectively, the right to "petition the [federal] Government for a redress of grievances."[193] To whom shall petitions concerning the Court's handiwork respecting religious liberty (or other "fundamental rights") be addressed?—To Congress or the courts themselves?

On this point, at least, the structure of the Constitution seems clear. Articles I, III, IV, VI, and the Seventeenth, Nineteenth, Twenty-third, Twenty-fourth, Twenty-sixth, and Twenty-seventh Amendments presuppose a *political* response. To the extent that the First Amendment recognizes a limited power in Congress and the states to legislate in furtherance of religious liberty as well as the right of the people to petition the government for redress of grievances, the political right of citizens of voting age to oust Senators and Representatives who either ignore their petitions or propose inadequate remedies is a necessary component of the liberty protected by the First Amendment. Henry J. Friendly was correct: the answers to questions such as these do have "profound effects for all of us."[194]

2. Due Process or Privileges and Immunities? The Substantive Implications.—"By strangling the privileges or immunities clause in its crib,"[195] *The Slaughter-House Cases*[196] made it all-but-certain that the Privileges and Immunities Clause route to incorporation of the Constitution's religious liberty guarantees would remain the path not chosen. The

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to political science and political theory." 115 S. Ct. 1624, 1638 (1995) (Kennedy, J., concurring) (citing Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019 (1977); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 524-32, 564 (1969)). "Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one." *Id.*

192. In fact, precisely the opposite is true. The more common tendency is to view the Ninth Amendment as a basis for federal court invalidation of state laws. *See, e.g., Symposium on Interpreting the Ninth Amendment*, 64 CHI.-KENT L. REV. 37-168 (1988); Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth, But What on Earth Can You Do With the Ninth Amendment?*, 64 CHI.-KENT L. REV. 239 (1988); THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989); CHARLES L. BLACK, DECISION ACCORDING TO LAW (1981). A notable exception is Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications For State Constitutional Law*, 1990 WIS. L. REV. 1229 (1990). Not only is Professor Massey's thesis an interesting one, it contains an extremely useful collection of the literature. *See id.* 1229-39 & n.2 (discussing the academic literature).

193. U.S. CONST. amend. I.

194. Amar, *supra* note 165 and accompanying text.

195. Amar, *supra* note 165, at 1259.

196. 83 U.S. (16 Wall.) 36 (1873).

structural fallout from that decision has significant substantive ramifications.[197]

"Due Process incorporation" of the religious liberty guarantees is, in both theory and practice, heavily dependent on a judicial reading of the nation's values respecting the relationship of religion and religious liberty to liberty in general.[198] Because that reading is not bound by an initial reference to an existing body of positive law other than the text of the First Amendment itself, the structural relationship of legislative to judicial power is quite complex.[199] In practice, the normative content of the Religion Clause has become "in large part a legal question to be answered on the basis of judicial interpretation of social facts."[200]

The cases demonstrate rather clearly that the religious liberty norms actually applied in a given case are less a function of judicial interpretation of "the Constitution and laws of the United States" than the result of an analysis which turns on both the level of generality chosen to describe the individual and state interests involved and the ensuing balance struck between them. Justice O'Connor, whose influence on the recent jurisprudence of the Religion Clause has been significant, is quite explicit about the process. In her view, the Court's function in religious liberty cases is to strike "sensible balances"[201] between the religious liberty of some individuals and the competing interests of others, including the state.

This reasoning has significant substantive consequences. The application of the First Amendment to the states has been a case-by-case process characterized by the application of ever more detailed and nuanced glosses on discrete rules or methodologies ("tests"). Over time, the rules applicable to Religion Clause cases have received so much judicial "gloss" that, to the extent they are recognizable as rules at all, they have become "blurred, indistinct and variable" and "depend[] on all the circumstances of a particular relationship,"[202] sometimes comically so.[203]

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197. *Id.* Professor Amar's articles on the Bill of Rights and the Fourteenth Amendment contain an illuminating—and exhaustive—discussion of the topic. *See* Amar, *supra* note 165; Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1138-41, 1146-62 (1991) (discussing the Federalist and Anti-Federalist critiques of the Constitution, as well as the federalism components of the proposals which evolved into the First Amendment as we know it today).

198. *See supra* notes 56-60 and accompanying text.

199. *See infra* Part IV.

200. Lynch v. Donnelly, 465 U.S. 668, 694 (1983) (O'Connor, J., concurring).

201. Employment Div. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring).

202. *Lynch* , 465 U.S. at 679 (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

203. A classic example is what has become known to those involved in the litigation of Religion Clause controversies as the "three plastic reindeers" rule. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992) (describing the concept as a "three plastic animals" rule). Dissenting in ACLU v. City of Birmingham, 791 F.2d 1561, 1569 (6th Cir. 1986), United States Circuit Judge David A. Nelson noted that the lesson which can be drawn from the cases involving the constitutionality of Christmas displays:

> comes down to this: A city is free to display such a scene at Christmas if it is balanced by symbols which, although they may also be associated with Christmas, are considered secular in origin. If enough such symbols are displayed, the manger scene will pass constitutional muster. It may be convenient to think of this as a "St. Nicholas too" test—a city can get by with displaying a crèche

Given this state of affairs, it is arguable that the Court has stepped outside the normal framework of judicial review of non-establishment and free exercise issues and into a more active, common-law style, policy-making role that defines the proper relationship between religion and the state. Yet, as interesting as a full discussion of that question might be, this Article is not the appropriate place to pursue it. For present purposes, it is enough to note that the legitimacy of what appears to be discretionary policy-making under the substantive due process and selective incorporation doctrines[204] turns on the answer to one question: Does the Fourteenth Amendment authorize *any* branch of the federal government to strike "balances"—sensible or otherwise—when the topic is "an establishment of religion" or a "law prohibiting the free exercise thereof?"

The Court plainly assumes that it does, but it has not given much attention to the separation of powers and federalism aspects of that assumption.[205] Under a privileges and immunities incorporation mechanism, positive law, including the Bill of Rights and federal legislation, plays an important and affirmative role in the protection of individual interests, including religious liberty. This has at least two important consequences.

The first is an obvious one. Because the Clause does not define the "privileges and immunities of citizens of the United States," the Court's initial task is to identify the reference point in positive law from which they can be incorporated. Because Congress is the branch charged by Article I with non-delegable tasks of weighing social facts and striking sensible balances among public and private interests, privileges and immunities incorporation puts much more weight on the existing balance between individual and community interests struck by "the Constitution and laws of the United States."[206] Thus, Congress would have a much more significant role with respect to religious liberty in an

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if it throws in a sleigh full of toys and a Santa Claus, too.

> The application of such a test may prove troublesome in practice. Will a mere Santa Claus suffice, or must there also be a Mrs. Claus? Are reindeer needed? If so, will one do or must there be a full complement of eight? Or is it now nine? Where in the works of Story, Cooley or Tribe are we to find answers to constitutional questions such as these?

Such "lessons" could easily be dismissed as comical were the issues not so serious. Judge Nelson captures the point well:

> The point I am trying to make is a serious one, of course. The holiday we celebrate as Christmas began as a pagan festival millennia before the birth of Christ, and "some people have thought that the Christians invented Christmas to compete against the pagan celebrations of December twenty-fifth." Earl W. Count, *4000 Years of Christmas* (1948), pp. 18 & 27. The symbolism of Christmas in the 20th Century A.D. continues to incorporate many pagan elements, and Christmas would hardly be Christmas, for most Americans, without them. But I question whether it is appropriate for the federal courts to tell the towns and villages of America how much paganism they need to put in their Christmas decorations, and I am reluctant to attribute to the Supreme Court an intent to point us in that direction by implication.

Id. at 1569.

204. *See* Glendon & Yanes, *supra* note 17, at 546.

205. *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968); Aguilar v. Felton, 473 U.S. 402 (1985). *See generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

206. U.S. CONST. art. III, § 2, cl. 1.

incorporation analysis based on the Privileges and Immunities Clause than it does under the current regime of Due Process Clause incorporation. *Texas Monthly* and the Religious Freedom Restoration Act demonstrate that this issue is of more than academic importance.

The second consequence flows directly from the first. The Court has yet to deal with the explicit federalism of the text of the First Amendment itself. The words "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"[207] sound in both federalism and freedom. To pose the question: "Given the text of the First Amendment, what role may Congress and the states play in the *protection* of religious liberty?" is to raise the federalism and freedom questions in a manner which is both clear and historically comprehensible. Under the "pre-incorporation" First Amendment, Congress and the Court had *some* role, but it was limited substantively by the text and structurally by the limited legislative jurisdiction of the federal government. The lawmaking powers of the states (both legislative and judicial) were explicitly reserved.

Does the Fourteenth Amendment repeal the federalism and separation of powers components of the pre-incorporation equation? Once again, the Court plainly assumes that it does—but only with respect to the Court itself. From whence, if not from the Fourteenth Amendment, does the Court derive the power to issue orders respecting any "establishment of religion," or limiting a state's ability to foster "the free exercise thereof" in a manner otherwise consistent with the rights of equal citizenship? The Court has never answered this question. *Everson* simply states a rule to be applied in future cases without ever considering whether Congress and the President could have deemed a statute with provisions identical to the list provided by the Court to be a "necessary and proper" means of enforcing the Fourteenth Amendment.[208]

When the Court announces rules ("tests") that are to be applied in future constitutional cases, such pronouncements, like legislation, have "the purpose and effect of altering the legal rights, duties and relations of persons" and institutions (including Congress, the executive and the states) outside the case or controversy in which they are announced.[209] The Court confirmed this view of its power in *Cooper v. Aaron*[210] when it

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207. U.S. CONST. amend. I (emphasis added).

208. The Court held in *Everson*:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (citation omitted).

209. *Cf.* INS v. Chadha, 462 U.S. 919, 951-52 (1983). The dissenting opinion of Justices Brennan and Marshall in *Marsh v. Chambers* is as clear an example as can be found in the case law. 463 U.S. 783, 796 (1983).

held that "[i]t follows [from *Marbury v. Madison* and the Supremacy Clause] that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'"[211]

There are, of course, two ways to interpret what appears on its face to be a rather sweeping claim of judicial power.[212] The first, and most consistent with *Marbury* and the Supremacy Clause, is that the Court is indeed the final arbiter of any "case or controversy" which comes before it, but the binding nature of its rulings is limited by the scope of its jurisdiction.[213] Other branches are free to interpret the Constitution in the manner they deem appropriate when the issue falls within the scope of their permissible discretion. What this means in practice is that the only meaningful constraint on judicial attempts to narrow the permissible scope of religious freedom short of a constitutional amendment is a congressional declaration that a more robust version of that liberty is either a "privilege or immunity of citizens of the United States," or an aspect of "liberty" under the Due Process Clause of the Fourteenth Amendment.

Would such a response be a legitimate one for Congress? I submit that it would be and discuss the details of the argument in Part IV. For present purposes, however, it is sufficient to note that unless the Court's rulings are exempt from otherwise applicable constraints on state and federal policy-making discretion, including the First Amendment and the Test Clause (a proposition which seems wrong on its face), Article VI and *Marbury* require that the substantive rules developed by the Court to resolve future cases or controversies should be justified (tested) under the same criteria and at the same level of scrutiny as the Constitution requires for acts of Congress or a state legislature. But, as the keeper of the due process flame, the Court's pronouncements and sensible balances are, for all practical purposes, exempt from review under the standards applicable to congressional, executive and state action—or are they?

The answer to this question depends upon whether or not the Constitution assigns a "checking" function with respect to the Court to a coordinate branch of the federal government. Does the Constitution assign this task to Congress? I believe that it does. Congress already bears the structural obligation of "reviewing" both the face and the application of the rules developed by the Court. It is the branch which controls the Court's budget, its appellate jurisdiction, its size, and the tenure of individual Justices under the "good behavior" standard of Article III.[214] It also regularly makes "adjustments" to the substantive rules announced when the Court decides cases under the Dormant Commerce Clause and the Fourteenth Amendment. The analytical problem is how to

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In their view "settled doctrine"—the standard of review—is to be applied with an "unsentimental eye" in much the same manner that a first-year law student would apply a statute. *Id.*

210. 358 U.S. 1 (1958).

211. *Id.* at 18 (quoting U.S. CONST. art. VI).

212. *See* Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387 (noted in LOCKHART ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 15 & note m. (7th ed. 1991)).

213. *See* LOCKHART ET AL., *supra* note 170, at 13-16 (collecting sources).

214. U.S. CONST. art. III, § 1.

conduct such a systematic review in the First Amendment area without crossing the separation of powers boundary and intruding on the power of judicial review itself (which, in the end, will be impossible without a clear definition of the constitutional norms in question), or upsetting the Court's institutional sensibilities (which may be impossible).[215]

Given the nature of the substantive and structural issues at stake, the first part of a systematic inquiry into these issues is an examination into the relationship of the norms contained in the Fourteenth Amendment to those incorporated from the First.

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215. They are significant indeed. In *Planned Parenthood v. Casey*, a majority of the Court (Justices O'Connor, Kennedy, Blackmun, Stevens, and Souter) agreed with the following proposition:

> The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. . . . The Court's power lies in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.
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> . . . .
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> . . . There is a limit to the amount of error that can plausibly be imputed to prior courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

112 S. Ct. 2791, 2814-15 (1992).

It is difficult to discern precisely why "[t]he root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon th[e] Court." *Id.* at 2814. The "root of American governmental power" is not revealed in either the Court's or "[s]ociety's understanding of the [social] facts [of life] upon which a constitutional ruling [is] sought" at a given place or time. *Id.* at 2813. Rather, it lies in the consent of the governed as manifest in their reluctance to utilize the powers reserved to them under Article V.

From a structural perspective, Plessy v. Ferguson, 163 U.S. 537 (1896), was wrongly decided "the day it was decided," not because the social "facts of life" had changed (they certainly had not changed for Louise Brown), or because "changed circumstances may impose new obligations," or because "the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty." *Planned Parenthood*, 112 S. Ct. at 2813. In point of fact, *nothing relevant to the Court's obligation* had changed. That duty clearly existed from the ratification of the Civil War Amendments, which were plainly intended—by their plain language and structure (not to mention their legislative history)—to lift African-Americans from the bonds of slavery and make them citizens equal before the law. The only thing that changed over time—and it is significant that the Court was honest enough to admit it—was that the Court was able to find, as a social fact, that "the thoughtful part of the Nation" (including the majority of the Court) "could accept" the social and legal consequences of "the Court's [performing its] constitutional duty." *Id.* It has not gone unnoticed, however, that it took nearly twenty years before the Court realized that the "all deliberate speed" timetable proposed in Brown v. Board of Education, 347 U.S. 483 (1954), was a mixed message coming from an institution which had tolerated Jim Crow for nearly a century.

B. "Structural Incorporation": Weighing the Impact of the Text and Structure of the Fourteenth Amendment on the Religious Liberty Norms Incorporated from the First Amendment

One of the most important questions left open by *Cantwell* and *Everson* is the effect of the text and structure of the Fourteenth Amendment on the constitutional norms (rights) it incorporates. Like the First Amendment itself, Section One of the Fourteenth Amendment contains a number of substantive rules designed to effectuate a common purpose: Legal protection for individuals from specific kinds of harm. In the case of the First Amendment, the harms are interference with the rights of citizens and others to speak, publish, practice their religion, and assemble peaceably for any purpose, including the right to petition for redress of grievances. In the case of the Fourteenth Amendment, the overarching concern was to eliminate state-sponsored racial discrimination—an insidious practice that touched virtually every facet of daily life. For millions of Americans, the vestiges of officially sanctioned discrimination remain to this day.

At a more structural level, the Citizenship, Privileges and Immunities, Due Process, and Equal Protection Clauses were designed by the Reconstruction Congress to perform three basic tasks: 1) overrule the Supreme Court's assertion in *Dred Scott v. Sandford*[216] that persons of African descent had no rights that a white person or state was bound to respect;[217] 2) negate state claims that federal efforts to enforce standards of equal citizenship might be a violation of their retained sovereignty; and 3) empower Congress to make such rules as might be necessary to make the promise of equal citizenship a reality.

The Supreme Court's record with respect to enforcing the principles enshrined in the Fourteenth Amendment may charitably be described as mixed, but what has emerged from the Court's fits and starts is a body of doctrine that provides us with at least three clearly articulated themes: First, that citizens and other persons within the jurisdiction of the

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216. 60 U.S. (19 How.) 393 (1857).

217. *Id.* at 407, 410, 416. Justice Roger Taney wrote:

> They [persons of African descent] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.
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> . . . .
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> . . . [They] were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.
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> . . . [A]nd it is hardly consistent . . . to suppose that they [the people of the states] regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; . . . upon whom they had impressed such deep and enduring marks of inferiority and degradation; . . . to include them in the provisions . . . for the security and protection of the liberties and rights of their citizens.

Id. This holding was overturned by the Citizenship Clause. U.S. CONST. amend. XIV, § 1.

states are entitled to both equal protection and due process of law.[218] Second, that the Court is determined to play a major role in both defining and enforcing these norms.[219] And third, that the policies enacted by Congress will be given great deference in most circumstances.[220]

Professor Amar's observation concerning "the peculiar logistics of incorporation"[221] is particularly relevant here. When speaking of the incorporated First Amendment, "the Civil War Amendment is mentioned only in passing or not at all," and the result is that "we *appear* to be applying the First Amendment directly" when, actually, we are not.[222] Viewing the First Amendment through the lens of the Fourteenth thus presents some interesting, albeit unresolved, questions.

1. Relating the Religious Liberty Norms of the First Amendment to the Equal Citizenship and Protection Norms of the Fourteenth.—The most important of these unresolved questions, for present purposes, is the relationship between the religious liberty norms of the First Amendment and the equal citizenship and protection norms of the Fourteenth Amendment. The Court has consistently failed to explore the link between the Equal Protection, Citizenship and Privileges and Immunities Clauses and the "incorporated" First Amendment as a whole.[223] The Court's opinions occasionally disclose that de jure religious discrimination may be a factor in the case before them,[224] but neither the categorical reasoning employed to decide Establishment Clause cases, nor the multifactor balancing utilized in free exercise litigation appear to allow much room for analysis of this problem.[225] Though the same can be said for much of the Court's jurisprudence under the Speech and Press Clause, there are indications that the Court is beginning to recognize problems in cases arising under the Religion Clause as well.[226]

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218. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982); Baker v. Carr, 369 U.S. 186 (1962); Brown v. Board of Educ., 347 U.S. 483 (1954).

219. *See, e.g.*, Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Flast v. Cohen, 392 U.S. 83 (1968).

220. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); Fullilove v. Klutznick, 448 U.S. 448 (1980); Katzenbach v. Morgan, 384 U.S. 641 (1966). *But see* Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995); Miller v. Johnson, 115 S. Ct. 2475 (1995); Oregon v. Mitchell, 400 U.S. 112 (1970).

221. Amar, *supra* note 17, at 1136.

222. *Id.*

223. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); Casarez v. State, No. 1114-93, 1994 WL 695868 (Tex. Crim. App. Dec 14, 1994) (religious discrimination in *voir dire*); State v. Davis, 504 N.W.2d 767 (Minn. 1993) (religious discrimination in *voir dire*), *cert. denied*, 114 S. Ct. 2120 (1994).

224. *See, e.g.*, Board of Educ. v. Grumet, 114 S. Ct. 2481 (1994); Hernandez v. Commissioner, 490 U.S. 680 (1989) (O'Connor, J., dissenting); Larsen v. Valente, 456 U.S. 228 (1982); Sherbert v. Verner, 374 U.S. 398 (1963).

225. It could be argued that the neutrality requirement imposed by the Establishment Clause captures the equality components of both the Speech and Equal Protection Clauses. *See* Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986). I do not believe that, as applied in many cases litigated under both components of the Religion Clause, the Court's own reasoning could survive "strict" Equal Protection or Speech Clause scrutiny.

226. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Lee v. International Soc'y for Krishna

What has largely been ignored in the Court's selective use of history as a guide to the interpretation of the incorporated First Amendment is the "social fact"[227] that religious discrimination and prejudice, like their counterparts in the field of race and gender relations, have a long and sordid pedigree in this country. De jure religious discrimination led to Roger Williams' exile from Massachusetts and the founding of Rhode Island. It was the hallmark of the British and Colonial establishments,[228] for social control and unequal citizenship went hand in hand. Deeply ingrained in the fabric of community life, it continued to exist in the states even after the adoption of laws to guarantee religious liberty in the post-colonial period, and it has played a major role in national and local political struggles ever since.

The influx of immigrants during the great immigration waves from Europe during the century between 1820 and 1920 added cultural and religious xenophobia to the mix. In 1790, Catholics numbered only about 35,000 out of a total population of over four million, and together, Catholics and Jews amounted to only about 0.1 percent of the population.[229] "The great Atlantic migration," first of the Irish, later of Germans and Scandinavians, and finally of Eastern and Southern Europeans, brought in over forty million immigrants with "foreign" ways, languages, and loyalties. For many, this was an unwelcome development, and it is mirrored today in the prejudice and intolerance of the religious traditions of our newest immigrants from Africa, the Caribbean Basin,[230] Central and South America, the Pacific Rim, and the Indian Subcontinent.

Consciousness, Inc., 112 S. Ct. 2709 (1992). *Cf.* Lee v. Weisman, 505 U.S. 577 (1992).

227. *See* Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877 (1988); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986). Although it is not clear if judicial reliance on findings of "social fact" is legitimate in constitutional decision-making, it is quite clear, as Professors Walker and Monahan put it, that there is a "more generic movement on the part of American courts to use general research findings to create a context or background within which facts specific to a case can be determined." Walker & Monahan, *supra*, 73 VA. L. REV. at 571 n.32. The use of "social fact" as background played an important role in shaping the Supreme Court's approach, if not the outcome of the case itself. It is in the "social framework" sense that the term "social fact" is used here.

228. Commenting on the debates over the Test Clause of Article VI during and after the Constitutional Convention, Professor Bradley underscores the Machiavellian spin that the Clause places on the Golden Rule by reminding us just how prejudiced many of the Framers were:

> In all, it is just not morally inspiring to be told that the foundation of constitutional liberty was a system of ambition, jealousy, and parochialism of our hallowed founding generation. For instance, one of the government-funded, Bicentennial, celebratory projects is "baseball cards" of the fifty-five framers. I doubt that the vital statistics on the back of Roger Sherman's card will include his hatred for Catholics.

Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 743 (1987) (citation omitted).

229. REV. H.A. BUETOW, NATIONAL CATHOLIC EDUC. ASSN., KEYNOTE SERIES NO. 2, A HISTORY OF UNITED STATES CATHOLIC SCHOOLING 13 (1985).

230. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993).

The Nineteenth Century immigration period was characterized by a politics tainted with overt religious, ethnic, and racial animus. Discrimination on the basis of race, national origin (which was often equated with race) and religion (which is often associated with nationality)[231] was practiced openly, and a wide range of discriminatory legal policies neutral on their face, but discriminatory in both purpose and effect were adopted.[232] There was violence as well.[233] It was not until the early 1920s that the Supreme Court intervened.[234] And when it did intervene, it did so on the basis of a substantive due process: freedom of contract or religious liberty, but not equal protection.

Application of rules developed for equal protection cases involving de jure discrimination would yield results in a number of religious liberty cases that would be quite interesting. Religious liberty cases often contain hints—if not explicit evidence—that de jure discrimination on the basis of religion is at least one source of the complaint at issue. This was certainly the case in both *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,[235] where the law was aimed at a specific religious sect and its practices, and in *Sherbert v. Verner*,[236] where the law contained an explicit exemption for Sunday observers forced to work on their Sabbath.[237] Further, history leaves little doubt that

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231. St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (definition of "race discrimination" under 42 U.S.C. § 1981 (1988), as applied to persons of Arab descent); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987) (definition of "race discrimination" under 42 U.S.C. §§ 1981 & 1982 as applied to persons of Jewish descent).

232. There is an extensive discussion of this problem in Washington State contained in the dissenting opinion of Justice Utter of the Washington Supreme Court in Witters v. State Comm'n for the Blind, 771 P.2d 1119 (Wash. 1989), *reaffirming on state constitutional grounds* 689 P.2d 53 (1984), *rev'd sub nom.* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986). In New York, for example, a law passed in 1813 provided that the Free School Society (later the Public School Society) should allocate the educational funds at its disposal to, among others, "such incorporated religious societies in said city, as now support or hereafter shall establish charity schools within the said city, who may apply for the same." PAUL A. FISHER, BEHIND THE LODGE DOOR: CHURCH, STATE AND FREEMASONRY IN AMERICA (1988) (quoting CHARELTON BEALS, BRASS KNUCKLE CRUSADE 45-77 (1960)). Immigration changed all that.

From the perspective of the non-Protestant immigrants whose choice in education was limited to the newly-established public schools, the vestiges of the de jure religious establishment were alive and well. These schools "tended to be close copies of the Protestant schools they replaced," and when Catholic and Jewish immigrant groups were unsuccessful in their attempts "to remove Protestant sectarianism from the public schools," they began to request their fair share of the tax monies allocated to the schools of other religious organizations under the 1813 statute. The result was a change in the law of New York which denied funds to any school which taught "sectarian doctrine." *Id.* (quoting WM. OLAND BOURNE, HISTORY OF THE PUBLIC SCHOOL SOCIETY OF THE CITY OF NEW YORK 7, 31, 45 (1870)); W.G. KATZ, RELIGION AND THE AMERICAN CONSTITUTIONS 63 (1964).

233. Mormons and Catholics were subjected to some of the most brutal attacks, including murder and arson.

234. Meyer v. Nebraska, 262 U.S. 390 (1923).

235. 113 S. Ct. 2217 (1993).

236. 374 U.S. 398 (1963).

237. *Id.* at 406. The Court stated:

> Significantly South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty. When in times of

discrimination has played a significant role in the treatment of Mormons and their beliefs.[238]

Because religious discrimination is essential to the maintenance of what the First Amendment refers to as "an establishment of religion," preferential treatment, test oaths to demonstrate one's loyalty to king and country, and attempts to rid the community of dissenters from the reigning orthodoxy by suppression of free exercise and contrary world-views should be seen as devices designed to maintain a de jure orthodoxy respecting religion. Viewed through the lens of the Fourteenth Amendment, each device which can be utilized to support an establishment of religion would (or should) also present a prima facie case under either the Privileges and Immunities or the Equal Protection Clause. Intent to discriminate (classify) on the basis of a characteristic which is, or has been held to be, *legally* irrelevant to government decision-making as a matter of constitutional law (inherently suspect) is the essence of an equal protection claim. It also happens to be the essence of a claim under the Test Clause of Article VI.

The Court's selective use of history in its interpretation of the Religion Clause thus has another insidious effect: it misses the forest for the trees. The views of the champions of religious freedom during the Colonial period are significant indeed, but they were not mere philosophical reflections on the human condition. Madison, Jefferson, Roger Williams and other champions of religious liberty during the formative period are remembered because their commitment was directed toward the alleviation of human suffering at the hands of governments *antagonistic* to religious beliefs other than those established by law, and to religious practices that were deemed to be inconsistent with the religio-cultural cohesiveness of the community.[239]

Madison, Jefferson and Williams are heroes, not because they were able to translate their views into statutory or constitutional law, but because their commitment to human rights and non-discrimination for those who did not partake in the political orthodoxy concerning religion was the *exception* in their respective states, not the rule. It was their commitment to religious liberty and non-discrimination, as well as their savvy at power politics, that gave Madison and Jefferson the credibility to motivate those Virginians who lived under the heel of the Anglican boot to challenge what might be described today as

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> "national emergency" the textile plants are authorized by the State Commissioner of Labor to operate on Sunday, "no employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious . . . objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner." S.C. Code, § 64-4. No question of the disqualification of a Sunday worshipper for benefits is likely to arise, since we cannot suppose that an employer will discharge him in violation of this statute. The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects.

Id.

238. Judge John T. Noonan, Jr. has noted, however, that the laws against polygamy were actually the result of a sustained effort on the part of a number of religious groups to ban the practice. *See* John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567 (1992).

239. *See* Rys Isaac, *Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia, 1765 to 1775*, 31 WM. & MARY QUARTERLY 345 (1974).

political correctness in the field of religion.[240]

2. "Neutrality" or Non-Discrimination: Importing the Debate Over "Intent" vs. "Effects" into the Jurisprudence of the Religion Clause.—The Court's equal protection jurisprudence reflects an important ongoing debate over the nature of the judicial role. *Employment Division v. Smith, Texas Monthly v. Bullock*, and *Board of Education v. Grumet* illustrate that this debate has now spilled over into cases arising under the Religion Clause as well.

In sum, the issue is whether the Court's role is limited to cases in which there is discriminatory intent, or whether it should intervene in cases where there is a discriminatory effect on a protected class as well. The Court's opinion in *Smith* signaled its decision to take a Fourteenth Amendment approach to at least *some* First Amendment cases. Justice Scalia, writing for the majority in *Smith*, explained that "the *First Amendment* has not been offended" if generally applicable and otherwise valid legislation has the incidental effect of "prohibiting the exercise of religion."[241] The Court has taken a major step toward integrating its interpretation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. It did so by extending the rule of *Washington v. Davis*[242] to cases arising under the Free Exercise Clause.

After *Smith*, proof of intent to discriminate or otherwise burden religion is required to trigger plenary review under the Free Exercise Clause.[243] At its most basic level, such an approach will subject laws or practices which smack of religious discrimination to the same strict scrutiny applied to other forms of intentional discrimination. The debate within the Court over this point was developed in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[244] Justice Kennedy's opinion for the majority indicates that "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[245]

But just as in equal protection cases, there is a dispute within the Court over what kinds of conduct are prohibited. All of the Justices in *Lukumi* were of the view that the laws which target religious practice, either overtly or covertly, are unconstitutional. Justice Souter's concurring opinion, for example, agrees that the Hialeah law is unconstitutional "[b]ecause prohibiting religious exercise is the object of the laws at hand," but he hastens to point out that "[*Lukumi*] does not present the more difficult issue addressed in . . . [*Smith*], which announced the rule that a 'neutral, generally applicable'

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240. *See generally* Daniel L. Driesbach, *A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in its Legislative Context*, 35 AM. J. OF LEGAL HIST. 172 (1991); Daniel L. Driesbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C. L. REV. 159 (1990).

241. Employment Div. v. Smith, 494 U.S. 872, 878 (1990) (emphasis added).

242. 426 U.S. 229 (1976). *See Smith*, 494 U.S. at 886.

243. *See* Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969) (antitrust law impact on press liberty); Washington v. Davis, 426 U.S. 229 (1976) (racial discrimination). In one respect, it only stands to reason that if the Fourteenth Amendment itself requires intentional action, then so too should judicial review which relies upon its Due Process Clause as the source of judicial authority.

244. 113 S. Ct. 2217 (1993).

245. *Id.* at 2221.

law does not run afoul of the Free Exercise Clause even when it prohibits religious exercise in effect."[246]

As understood in the Free Exercise Clause context, the "effects" test looks to what Professor Douglas Laycock describes as "substantive neutrality";[247] a proposition described by Justice Souter as one "which, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws"[248] whenever the law "unduly burdens the free exercise of religion." [249] Justices O'Connor and Blackmun agreed: "When the State enacts legislation that *intentionally or unintentionally* places a burden upon religiously motivated practice, it must justify that burden by 'showing that it is the least restrictive means of achieving some compelling state interest.'"[250]

The problem, of course, is how to determine just what a "substantial" or "undue burden" on the free exercise of religion *is*, and, more importantly, *who* is empowered to make a determination that a burden exists, and that a special exemption is either necessary or appropriate? By forcing consideration of free exercise cases into the existing framework of Fourteenth Amendment jurisprudence, the Court in *Smith* has raised a number of extremely significant questions. These questions go to the heart of the Court's incorporation of the First Amendment,[251] and to the thorny issues of separation of powers and federalism which have been long ignored.

3. Relating Norm to Structure: The Power to Relieve Governmentally-Imposed Burdens on Religious Practice.—Taken at face value, Justice Scalia's comments in *Smith* regarding the role of the legislature in protecting First Amendment rights hold out the possibility that legislatures, including Congress, might be able to enact laws specifically designed to protect religious liberty alone.[252] The *Texas Monthly* case reaches precisely the opposite conclusion. The result is that the structural and normative questions which emerge from *Smith* and *Texas Monthly* are virtually identical to those which divide the Court on questions of affirmative action:[253] the content of the relevant constitutional norms (Equal Protection and Free Exercise), the role of the Court as an advocate for minorities, and the right of Congress to intervene should the Court reach a policy conclusion it considers to be an inappropriate response to a pressing social problem.

Two further points are worth noting. First, the Court in *Smith* appears to have limited the reach of its holding to cases arising under the Free Exercise Clause.[254] This aspect of

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246. *Id.* at 2242 (Souter, J., concurring).

247. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

248. *Church of the Lukumi Babalu Aye, Inc.*, 113 S. Ct. at 2241.

249. *Id.* at 2242 (quoting Employment Div. v. Smith, 490 U.S. 872, 896 (1990)).

250. *Id.* at 2250 (citing Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981)) (emphasis added); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

251. The original drafts of this Article included a comparative discussion of the substantive, rather than the structural, protections afforded freedom of speech and religion. Due to space limitations, however, it was necessary to delete them. Along with additional material, they will be published as a separate Article.

252. *See supra* notes 156-58 and accompanying text.

253. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

254. "Hybrid" cases—those involving the Free Exercise Clause "in conjunction with other constitutional

Smith has been particularly nettlesome to Justice Scalia's critics, who have accused him of being openly hostile to free exercise rights. However, precisely the opposite is true and his critics have failed to consider the significance of Justice Scalia's dissent in *Texas Monthly*.

Neither the case law nor the literature supports the proposition that accommodation of any individual right—especially those protected by the First Amendment—must proceed on a case-by-case basis; yet this is precisely what *Texas Monthly* holds with respect to the Free Exercise Clause.[255] *Smith* presents the converse scenario. In *Smith*, the issue was whether the Free Exercise Clause *required* an exemption—the very issue Justice O'Connor would have reserved in *Texas Monthly*.[256] Just as in *Texas Monthly*, Justice O'Connor concluded in *Smith*[257] that there was no showing of concrete need to accommodate under the circumstances.

The interesting thing about this particular controversy is how little it has to do with religious liberty. The real issue is judicial power. Justice Scalia opposes courts striking what Justice O'Connor calls "sensible balances." In operation, these sensible balances inevitably limit the ability (and power) of legislatures, including Congress, to accommodate the sincerely-held religious beliefs and practices of all of those who feel threatened by what Justice Kennedy and others have called the "modern administrative state."[258]

For the Justices who joined the majority opinion in *Smith* (Scalia, Kennedy, Stevens, White, and Chief Justice Rehnquist), most of the criteria relevant to striking such a balance are simply irrelevant: the degree of burden, the centrality of the belief, the importance of the state's interest, and one's status in the community (i.e., as a "minority," however defined).[259] When the task is striking balances of this sort, their preference (at

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protections, such as freedom of speech and of the press"—may indeed qualify for analysis under an "effects" test in the future. Employment Div. v. Smith, 494 U.S. 872, 880, 887 & n.4. (1990).

255. *But see* Louis Fisher, *The Curious Belief in Judicial Supremacy*, 25 SUFFOLK U. L. REV. 85 (1991).

256. *See supra* notes 74-81 and accompanying text.

257. *Smith*, 494 U.S. at 906-07.

258. County of Allegheny v. ACLU, 492 U.S. 573, 655, 657 (1989) (Kennedy, White & Scalia, JJ., concurring and dissenting).

259. See *Fullilove v. Klutznick*, in which Justice Stevens' dissent raised the definitional question in the context of minority set-asides:

> [W]hy were these six racial classifications, and no others, included in the preferred class? Why are aliens excluded from the preference although they are not otherwise ineligible for public contracts? What percentage of Oriental blood or what degree of Spanish-speaking skill is required for membership in the preferred class? How does the legacy of slavery and the history of discrimination against the descendants of its victims support a preference for Spanish-speaking citizens who may be directly competing with black citizens in some overpopulated communities? Why is a preference given only to owners of business enterprises and why is that preference unaccompanied by any requirement concerning the employment of disadvantaged persons? Is the preference limited to a subclass of persons who can prove that they are subject to a special disability caused by past discrimination, as the Court's opinion indicates? Or is every member of the racial class entitled to a preference as the statutory language seems plainly to indicate?

448 U.S. 448, 552-53, 552 n.30 (1980).

least in some of these cases) appears to be for the legislature. The dissenters, including Justices O'Connor and Souter vehemently disagree on this point.[260]

The second point is also noteworthy. The most significant impact of the extension of Fourteenth Amendment reasoning to all religious liberty cases would be on the Court's interpretation of the Establishment Clause. This is so for two reasons: one substantive and one structural.

The substantive reason is briefly summarized. To the extent that the effect of an otherwise valid and facially neutral statute does not violate the First Amendment, both the second prong of the analysis set out in *Lemon v. Kurtzman*[261] for Establishment Clause cases, and Justice O'Connor's endorsement analysis are at risk. *Lemon*'s second prong asks whether the "principal or primary *effect* [of the governmental practice at issue] either advances [or] inhibits religion . . . ."[262] If it does, the law is unconstitutional. Endorsement analysis also rests squarely upon the *effect* that endorsements have on a hypothetical objective observer.[263]

An approach to Establishment Clause cases which proceeds structurally from the individual orientation of the Fourteenth Amendment would eliminate one of the more troublesome substantive aspects of the Court's jurisprudence: its propensity to strike what shifting majorities consider to be "sensible balances" on the basis of judicial interpretation of social, rather than adjudicative facts.[264] This has the operational effect of reading the welfare of the individual citizens involved in the case out of the analytical equation.

Since *Everson*, the Court's concern in Establishment Clause cases has focused almost entirely on the effect that government action has on religion,[265] rather than individuals.[266]

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260. Part II of Justice O'Connor's opinion in *Smith,* joined by Justices Blackmun, Brennan, and Stevens, contains an extensive discussion of the values underlying the respective clauses, and the role of both categorical reasoning and balancing in the Court's analysis. *See* Employment Div. v. Smith, 494 U.S. 872, 901-02 (1990).

261. 403 U.S. 602 (1971).

262. *Id.* at 612.

263. The concept of the "objective observer" is derived from the opinions of Justice O'Connor in Wallace v. Jaffree, 472 U.S. 38, 69 (1985), and Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987). In her view, apparently now adopted by the Court, the inquiry under the Establishment Clause should be how government action "would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute" or policy at issue. *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in the result).

264. Lynch v. Donnelly, 465 U.S. 668, 694 (O'Connor, J., concurring).

265. *See, e.g.,* Aguilar v. Felton, 473 U.S. 402 (1985).

266. At least insofar as the expenditure of funds derived from taxes is concerned, an individual who alleges that government action "advances" religion need not demonstrate a personal injury; vindication of the "public" interest in the maintenance of an appropriate distance between church and state is enough. *See* Valley Forge Christian Academy v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) (no standing for taxpayers when government disposes of excess property); Flast v. Cohen, 392 U.S. 83 (1968) (taxpayer standing where funds are expended). *But see* Allen v. Wright, 468 U.S. 737 (1984) (no taxpayer standing to challenge tax exemptions of schools alleged to be racially discriminatory). Justice Powell's concurring opinion in *Aguilar v. Felton* is a good example of an instance where a member of the Court makes explicit the trade-off between individual and societal concerns that is implicit in the Court's Establishment Clause jurisprudence. Justice Powell noted that the Title I programs for disadvantaged children, which were held unconstitutional in the case, "concededly have 'done so much good and little, if any, detectable harm.'" However,

As a result, the effect of the government's actions on the people involved in non-establishment cases appears to be less important than the substantive balance to be struck by the Court among public and private interests.[267]

When government action is alleged to burden a specific individual's religious liberty interests, however, the case must be litigated under the Free Exercise Clause or another provision, such as the Speech and Press Clause,[268] that is appropriate under the circumstances. *Texas Monthly*, however, makes it clear that a claim of entitlement arising under either of these Clauses will not constitute a defense to a charge that an Establishment Clause violation has occurred. The Court will simply ignore the characterization and resolve the tension among the clauses at issue by striking a substantive balance between the individual liberty at issue and the non-establishment value.

The equal citizenship orientation of the Fourteenth Amendment would seem to require a slightly different approach. The Court's present approach is to read the Due Process Clause, the conduit through which the Court applies the First Amendment to the states, in isolation. It is not an isolated provision, however, but an integral part of a structural response to the problem of officially sanctioned discrimination by both the states and the Court. Taken as a whole, i.e., read structurally, the Fourteenth Amendment requires that lawmaking by either Congress or the states, the administration of the laws by either the executive branch or state authorities, and the judicial decision-making by either the state or federal courts be consistent with the equal citizenship and non-discrimination norms of Section One, the Test Clause, and the First Amendment.

Viewed structurally, the significance of the most recent series of Religion Clause cases, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,[269] *Lamb's Chapel v. Center Moriches Union Free School District*,[270] *Zobrest v. Catalina Foothills School District*,[271] and *Board of Education v. Grumet*,[272] lies not so much in their specific outcomes, but in the way in which the Court grapples with the role that de jure religious discrimination plays in the formulation of public policy, including its own holdings under the Religion Clause.[273]

4. Structuralism and the Debate within the Rehnquist Court.—We are now in a

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he concurred on the ground that "[o]ur cases have noted that '[t]he State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion.'" *Aguilar*, 473 U.S. at 402 (Powell, J., concurring).

267. This is the import of the Court's view that neither coercion nor discrimination is necessary to make a prima facie case under the Establishment Clause.

268. *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

269. 113 S. Ct. 2217 (1993).

270. 113 S. Ct. 2141 (1993).

271. 113 S. Ct. 2462 (1993).

272. 114 S. Ct. 2481 (1994).

273. In both Rosenberger v. The Rector & Visitors of the Univ. of Virginia, 115 S. Ct. 2510 (1995), and Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995), the Court divided over precisely this issue. In both cases, the majority strikes down state policies which discriminate on the basis of religion, and require the states to utilize formally neutral criteria in the administration of the public programs and fora at issue. The dissenters, by contrast, would hold not only that discrimination on the basis of religion is not only constitutionally permissable, it may sometimes be required.

position to review the structural posture of each of the factions within the Rehnquist Court on the constitutionality of laws that aid religion by creating religious exemptions from laws of general applicability. Viewed structurally, the *Texas Monthly* decision is more than just a conclusion that broadly-based religious exemptions violate the Establishment Clause. From a structural perspective, it is also an assertion of judicial supremacy in the field of policy "touching religion" made by at least two present and two former members of the Court.[274] The specter of legislatures writing religion-specific accommodations into general laws has long troubled a number of the Justices and commentators. Many of these individuals view affirmative accommodation as an official endorsement or advancement of religion at the expense of non-adherents or dissenters.[275] *Texas Monthly* adopts that perspective as the constitutional norm. After *Texas Monthly*, the judiciary must be convinced that a religion-specific exemption written by a legislature is required by the Free Exercise Clause. If the factions supporting it cannot demonstrate to the satisfaction of a court that a concrete need was the basis for the legislative accommodation, the legislative accommodation will violate the Establishment Clause.

Smith represents a radically different view of both judicial power and constitutional norm. The opinion in *Smith* explicitly rejects both the structural and the substantive balance of interests struck by the plurality in *Texas Monthly*. To the extent that the Constitution confers considerable discretion to federal and state legislators who write otherwise non-discriminatory laws of general applicability, the permissible scope of judicial authority is a narrow one indeed.

It is a small wonder that many advocates for religious liberty are upset with the current state of affairs. In its attempt to work around what Justice Brennan has called the "paradox" of the Religion Clause, the Court has finally accomplished what was predictable to objective observers all along: "in attempting to steer a course between the Scylla and Charybdis of the Establishment and Free Exercise Clauses," the Court has finally "collided with one and fallen into the other."[276]

This is why Justice Scalia's comments in *Smith* regarding the limits of judicial deference in free exercise cases are significant. Now that Congress has taken his suggestion to heart and attempted to reverse *Smith* by legislation, courts considering the issue find themselves unable to avoid either the structural questions raised in *Texas Monthly* or the normative ones left undecided in *Smith*.[277] Such an outcome would have

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274. The Justices include Brennan, Marshall, Stevens, Souter, O'Connor, and Blackmun. I have counted Justice Souter among the supporters of the analysis in *Texas Monthly* because his opinion in *Lee v. Weisman*, which was joined by Justices O'Connor and Stevens, explicitly endorses both its "strict separationist" holding and its rationale. 505 U.S. 577 (Souter, O'Connor, & Stevens, JJ., concurring).

275. *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226, 284 (1990) (Stevens, J., dissenting); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985). *See generally* Lawrence G. Sager & Christopher L. Eisgruber, *Why the Religious Freedom Restoration Act is Unsconstitutional*, 69 N.Y.U. L. REV. 437 (1994). *See also* sources cites *supra* note 12, and *infra* notes 284, 342.

276. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1131 (7th Cir. 1977) (Sprecher, J., concurring).

277. RFRA was held unconstitutional on separation of powers grounds in Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995). The United States District Court for the District of Hawaii reached precisely the opposite conclusion. *See* Belgard v. Hawaii, No. 93-00961, 1995 WL 170221, at *7 (D. Haw. Feb. 3, 1995)

the salutary effect of forcing the Court to test the limits of its own logic, not only with respect to the substance of religious liberty, but also with respect to "affirmative action" (i.e., accommodation) in the field of religious liberty as well. This will not be an easy task. Analysis at this point, however, is premature. A more fundamental structural problem stands in the way and it is to that question I now turn.

IV. STATE AND FEDERAL LEGISLATIVE EFFORTS TO PROTECT AND DEFINE THE SCOPE OF RELIGIOUS LIBERTY

One of the most remarkable aspects of the Court's opinion in *Smith* is its virtual invitation to legislatures to write legislation designed to remedy the disproportionate impact that facially neutral laws can have on members of minority religions.[278] Such a development leaves advocates for religious liberty and the Court in a tight bind. The Court's jurisprudence of the Religion Clause has long been what Justice O'Connor aptly described (albeit in another context) as "[on] a collision course with itself"[279] and with other constitutional and statutory guarantees.[280] The affirmative action implications of the decision in *Smith* place it on a collision course with equal protection theory as well. If affirmative action in the context of race discrimination presents the ultimate "hard question" under the Equal Protection Clause of the Fourteenth Amendment,[281] affirmative action designed to accommodate religious belief or practice ("affirmative accommodation") will be even more difficult.[282]

(holding RFRA constitutional pursuant to Congress' enforcement power under Section Five of the Fourteenth Amendment).

278. Employment Div. v. Smith, 494 U.S. 872, 888-89 (1990).

279. *See* City of Akron v. Akron Center for Reprod. Health, Inc., 462 U.S. 416, 455 (1983).

280. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (freedom of speech; content-based regulations); Zobrest v. Catalina Foothills Sch. Dist., 114 S. Ct. 2481 (1994) (equal protection; Education of Handicapped Act); Board of Educ. v. Mergens, 496 U.S. 226 (1990) (freedom of speech; Equal Access Act); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986), *vacating and remanding* 741 F.2d 538 (3d Cir. 1984) (student-initiated prayer in public schools); Widmar v. Vincent, 454 U.S. 263 (1981) (freedom of speech).

281. *See, e.g.*, Metro Broadcasting v. F.C.C., 497 U.S. 547 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Fullilove v. Klutznick, 448 U.S. 448 (1980).

282. That it should be so difficult for the Court to accept is somewhat surprising. In the now famous "Carolene Products footnote," the Court ushered in the era of "affirmative action" with respect to "particular religions or national or racial minorities." United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) ("[N]or need we enquire whether similar considerations enter into the review of statutes directed at particular religions or racial minorities . . . ."). Dean Guido Calabresi has referred to the Court's Establishment Clause holdings as "a form of affirmative action," since most of the cases involve "the validity of rules designed to protect the non-religious, even when such rules, in practice, burdened religion and the religious." Guido Calabresi, *The Supreme Court: 1990 Term Foreword: Antidiscrimination And Constitutional Accountability (What The Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 101 n.63 (1991) (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); Edwards v. Aguillard, 482 U.S. 578, 593-94 (1987); School Dist. v. Ball, 473 U.S. 373, 397-98 (1985)). He noted that "[s]uch rules could be viewed as examples of the dominant majority accepting burdens on itself for the benefit of outcasts." *Id.*

A primary reason for the difficulty is the Court's perception of the nature of the religious liberty guarantees it is obliged to enforce. Nearly thirty years ago, Justice William Brennan described the "logical interrelationship between the Establishment and Free Exercise Clauses" as a "paradox central to our scheme of liberty."[283] Why that relationship is a paradox, or why the Court should consider it a paradox, has never been explained. However, one thing is clear: *Smith* and *Texas Monthly* are the logical outcome of a jurisprudence built around a "paradox."

The immediate question is what can be done about it. Like so much else in the law, the answer to that question is: It depends on who is empowered to be the agent of change—the Court, the Congress, or the states.

A. Limiting the Role of State Legislatures: The Curious Case of Kiryas Joel

Read together, *Texas Monthly* and *Grumet* leave no doubt that state legislatures have little, if any, authority to grant relief from the burdens public policy may impose on specific religious groups. Both cases require legislation to be both generally applicable and neutral with respect to religion in order to pass muster under the Establishment Clause. To the extent that religious accommodation may be accomplished legislatively, it must be general in form and content and religiously neutral.

This has two intended effects. First, it forces all claims for relief from laws of general applicability (such as the claim involved in *Smith*) into court, thereby making accommodation claims "justiciable only."[284] Second, it narrows the circumstances in which accommodation will be permitted to those in which the judiciary will find a concrete need. The factual setting in which *Grumet* arose illustrates the nature of the problem.

Dean Calabresi's comments are quite interesting. Though his conclusion appears to be correct—that the Court's Establishment Clause case law is a form of "affirmative action"—his rationale for so concluding is inaccurate. It is simply wrong to characterize the beneficiaries of the Court's holdings as "non-religious." The only characteristic which is common to plaintiffs in Establishment Clause cases is their status as *dissenters* from government policy. Flast v. Cohen, 392 U.S. 83 (1968). Their religious beliefs run the gamut from nonbelief to religiously-based views of the proper relationship of church to state. As a result, it is doubtful that the mere fact that one dissents from a government policy concerning religious accommodation is enough to qualify the individual as a member of a "discrete and insular minority." Moreover, there is no doubt whatever that, with only a few notable exceptions, laws successfully challenged on Establishment Clause grounds are not "statutes directed at" the dissenting plaintiff. As a result, Dean Calabresi's speculation that the rules could be justified as "examples of the dominant majority accepting burdens on itself for the benefit of outcasts" is simply wrong. Calabresi, *supra*, 101 n.63. The burden was not borne by the "dominant majority," but by those minorities accommodated by the challenged statute. In fact, it could be argued that it was the "dominant majority" which reaped all the benefits. *See, e.g.*, Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Aguilar v. Felton, 473 U.S. 402 (1985).

283. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 230, 231, 247 (1963) (Brennan, J., concurring).

284. *See* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991).

The *Grumet* case involved the Satmar Hassidim, a "discrete and insular minority."[285] Like the Christian Amish involved in *Wisconsin v. Yoder*,[286] the Satmars' distinctive dress and cultural traditions, tightly-knit communities, and orthodox religious beliefs set them apart from their neighbors in both Brooklyn and rural Orange County, New York. Unlike the Amish, the Satmars did not isolate themselves in rural communities; they clustered in urban neighborhoods and did not hesitate to call upon the local community for the goods and services they needed, including special educational services provided by the local public school system.

When friction grew between the Satmars and their neighbors due to incompatible views concerning land use in the area of Orange County, New York, the Village of Kiryas Joel was incorporated. The incorporation subsequently reduced friction and gave the Satmars control over the character of their own neighborhoods. At that point, the schools were not a problem. Following Orthodox Jewish traditions, the Satmar children were educated in religious schools. Prior to 1985, Satmar children needing special education were provided with the services in their schools. After the Supreme Court's decision in *Aguilar v. Felton*,[287] however, things began to change.

In *Aguilar*, the Court held that public school teachers could not provide special education services on the premises of a religious school because Establishment Clause cases hold that "[t]he State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion."[288] Henceforth, if the Satmar children were to receive the services to which they were entitled under state and federal law, they would have to attend the public schools operated by the Monroe-Woodbury School District.

It was not a happy relationship. The Satmar parents felt the environment of the local public schools was hostile to their children and beliefs. They also felt the local school board was making no attempt to provide an environment in which the children could feel comfortable. The school board, however, felt constrained by both state and federal law. It did not believe that it had the authority to accommodate the religious and cultural needs of the Satmar children to the degree requested, and when the New York courts ruled that it did, it declined to do so.

After much litigation, the Satmar parents took their case to the New York Legislature. They petitioned for and received a "redress of grievances" in the form of a public school district with boundaries contiguous to the borders of their village. It was this accommodation which remains the subject of the continuing litigation over who shall control the educational environment for the special education children who live in the Village of Kiryas Joel.[289]

As in *Texas Monthly* and *Smith*, there are a number of ways in which the case could be characterized for analytical purposes. Among these are:

1) a "special education" case in which the focus is on the appropriateness of the

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285. Board of Educ. v. Grumet, 114 S. Ct. 2481, 2485-87 (1994).

286. 406 U.S. 205 (1972).

287. 473 U.S. 402 (1985).

288. *Id.* at 415 (Powell, J., concurring).

289. *See* Grumet v. Cuomo, 625 N.Y.S.2d 1000 (N.Y. Sup. Ct. 1995) (challenging constitutionality of new school district created in aftermath of Supreme Court decision).

educational environment for the individual children involved;

2) a "civil rights" case in which the question is how local school boards and state legislatures should deal with the issue of "cultural diversity" and "hostile environments";

3) a "religious test for public office" case in which the dispute centers on the ability or willingness of the Satmar majority in the town to adhere to their public trust, and administer a "secular" public school system;

4) a "merger of civic and religious authority" case in which the creation of the school district is viewed as the cession by the state of civil authority over a public institution to a religious organization or group;

5) a "religious accommodation" case in which the Satmar are viewed as a group whose religious liberty interests were adversely affected by a rule of general applicability (i.e., school attendance laws which resulted in the children's exposure to a hostile environment);

6) a "religious gerrymandering" case which raises directly the issue of whether the New York Legislature, knowing the religious demographics of the town, should have permitted the Village of Kiryas Joel to incorporate in the first place;

7) a "state sponsored segregation" case in which the dispute centers on the legitimacy of the state making it easier, or less expensive, for children to attend schools which are demographically identifiable (i.e., by race, religion, or other "suspect" characteristic);

8) a "petition for redress of grievances" case in which the dispute focuses on the common purpose of the faction seeking redress in order to determine the legitimacy of the legislative response; or

9) a "tangible support for religion" case in which the government is viewed as providing illicit support to the religious activities of the Satmar.

Because the Court was split over the appropriate characterization of the case, it was also split on what principles should be applied to resolve it.

1. Accommodating Religious and Cultural Differences via Legislation: Distinguishing Neutrality, Non-Discrimination, and Equal Protection.—

a. "Neutrality toward religion."—For the majority (Justices Souter, Blackmun, Stevens, O'Connor, and Ginsburg), the issue in *Grumet* was "neutrality toward religion."[290] That principle, according to the majority, was violated when the State of New York "delegat[ed its] discretionary authority over public schools to a group defined by its

290. Board of Educ. v. Grumet, 114 S. Ct. 2481, 2487 (1993).

character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally." [291]

Because the Court framed the issue as one of "delegation" of a public trust (i.e., of the discretionary administration of a public school system) "to a group defined by its character as a religious community,"[292] the case can be characterized in either of two ways. The first and most obvious choice is to view the delegation as creating Establishment Clause and equal protection problems because it unites "civic and religious authority"[293] through the creation of a religious gerrymander. It can also be viewed as a "religious test for public office" which challenges the right of a community identified by its common religion to exercise a public trust.[294]

In order to characterize the case as one involving the merger of religious and civic authority, the majority had to consider and decide a preliminary factual question: *Is the Village of Kiryas Joel a "religious group," or a legitimate organ of local self-government?* None of the justices in the majority address this question directly, but the impact of the observation that the Village is "a group defined by its character as a religious community" is clear. In the view of the majority, the Village of Kiryas Joel is a "religious group."[295] It gave the following reasons:

> 1) "those who negotiated the village boundaries when applying the general village incorporation statute drew them so as to exclude all but Satmars, and that the New York Legislature was well aware that the village remained exclusively Satmar in 1989 when it [created the school district]";[296]
>
> 2) "carving out the village school district ran counter to customary districting practices in the State,"[297] which had gradually eliminated local control by merging and centralizing school districts;
>
> 3) the Village district has very few students, "and in offering only special education and remedial programs it makes no pretense to be a full-service district";[298]
>
> 4) the district "origin[ated] in a special act of the legislature, rather than the State's general laws governing school district reorganization";[299] and

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291. *Id.*

292. *Id.*

293. *Id.* at 2488.

294. *See* McDaniel v. Paty, 435 U.S. 618 (1978); Torcaso v. Watkins, 367 U.S. 488 (1961).

295. Though the majority did not say so directly, Justice Souter's discussion of Larkin v. Grendel's Den, 459 U.S. 116 (1982), and the problems which arise when government grants a "special franchise" to a religion, indicates that the Court clearly had serious reservations concerning the legitimacy of the school district and the incorporation of the Village itself. *Grumet*, 114 S. Ct. at 2492, 2488-89.

296. *Grumet*, 114 S. Ct. at 2489.

297. *Id.*

298. *Id.* at 2490.

299. *Id.*

> 5) "the pattern of interdistrict transfers, proposed and presently occurring, tends to confirm that religion rather than geography is the organizing principle for this district."[300]

Read together, these anomalies point to what was obvious from the very beginning: a specific legislative intent to accommodate the needs of a specific discrete and insular religious group.[301]

In the majority's estimation, this is precisely what made the law unconstitutional. At least with respect to *religious* minorities, state legislatures can take steps to remedy civil rights violations only through neutral laws of general applicability.[302] If their needs are "targeted" for accommodation, the Court will want to know up front "whether the benefit received by the [religious group] is one that the legislature will provide equally to other religious (and nonreligious) groups."[303] This is so because the Judiciary has "no assurance that the next similarly situated group seeking a school district of its own will receive one," and the matter would be effectively insulated from judicial review to determine whether "the legislature may [have] fail[ed] to exercise governmental authority in a religiously neutral way."[304]

"Neutrality" and "equal protection," however, do not describe the same concept.[305] More important, it is the Fourteenth Amendment, not the First Amendment, which actually governs New York's conduct with respect to religious liberty. The *Grumet* case provides a textbook example of the difference between the equality principle(s) involved in religion cases and those applied in a standard equal protection case.

b. Equal protection: is Kiryas Joel segregated or is it a religious gerrymander?—

(i) Is Kiryas Joel a religious gerrymander?—Like Justices O'Connor and Blackmun in *Texas Monthly* and Justice O'Connor in *Smith*, Justice Kennedy attempts to "decide the issue [presented] upon [a] narrow[] theory." Although Justice Kennedy agreed that "a religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or discriminate against other religions as to become an establishment," he disagreed with the suggestion of Justices Souter, Blackmun, Stevens, and Ginsburg that the creation of the Kiryas Joel Village School District contravenes these basic constitutional commands.[306]

Justice Kennedy felt "[t]he real vice of the school district is . . . that New York created it by drawing political boundaries on the basis of religion."[307] This made *Grumet*

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300. *Id.* at 2490 n.5.

301. *Id.* at 2490.

302. *Cf.* Shaw v. Reno, 113 S. Ct. 2816 (1993); *id.* at 2834 (White, Blackmun, & Stevens, JJ., dissenting); *id.* at 2843 (Blackmun, J., dissenting); *id.* at 2845 (Souter, J., dissenting).

303. *Grumet*, 114 S. Ct. at 2491, 2494.

304. *Id.* at 2491. The New York Legislature has responded to the challenge by passing a facially neutral statute which is clearly designed to accommodate Kiryas Joel. *See also* Grumet v. Cuomo, 625 N.Y.S.2d 1000 (N.Y. Sup. Ct. 1995).

305. *See* Robert A. Destro, *Equality, Social Welfare and Equal Protection,* 9 HARV. J. L. & PUB. POL'Y. 51 (1986).

306. *Grumet*, 114 S. Ct. at 2501 (opinion of Kennedy, J.).

307. *Id.*

an equal protection case, and made the intent of the New York Legislature's line drawing exercise critical to the outcome of the case. Echoing the theme he articulated in *Lukumi*, Justice Kennedy asserted that the New York Legislature's decision to give the Village of Kiryas Joel control over the special education programs of its children should be viewed as a religious gerrymander rather than a legitimate legislative response to a community's petition for a redress of grievances arising from a religious and cultural conflict.[308]

This is an important distinction, but in light of his view that "[t]he danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial,"[309] it misses an important point. Given that the New York Judiciary had been unwilling or unable to resolve the controversy, the only remedy available *to the Legislature* was to redraw the school district lines. A finding with respect to their intent was critical. A finding that their otherwise-legitimate actions *resulted* in a demographically homogeneous district would not be enough to find a violation of the Equal Protection Clause.

(ii) Was there a legislative intent to segregate?—The key to an equal protection analysis is a finding of intent to classify on the basis of a characteristic that is impermissible as a matter of constitutional law. A standard equal protection analysis of the facts in *Grumet* should therefore have examined a number of factors to determine whether the New York Legislature intended to accomplish an impermissible purpose. The treatment of the Satmars in and by the public school system would be relevant because it could give rise to a need to remedy past discrimination; so too would be the Legislature's record with respect to the creation of special school districts.

Since it was clear that the New York Legislature had created public school districts designed to meet the unique needs of children in other settings,[310] the only *equal protection* question should have been the "fit" between the remedy and the problem to be solved. In the absence of a finding of a close relationship between the remedy and the problem, there would have been strong grounds for assuming that illegal discrimination (preference) was the motivating factor for the legislative act.

In *Grumet*, however, this was not the case. There was little dispute over the difficulties which were faced by the Satmar children in the public school. The legislative response, though targeted on the Satmar, was rationally related to an important state and private interest: meeting the special education needs of children in a distinctive cultural and religious community.

Whereas Justice Kennedy's concern was the *manner* in which the accommodation was carried out, Justices Stevens, Blackmun, and Ginsburg viewed the accommodation *itself* as raising an Establishment Clause problem.[311] Because the need arose in the context of public education, and involved the accommodation of both cultural and *religious* needs, they viewed *Grumet* as a religious education case.[312] Accordingly, their focus shifted from the interests of the Satmar children who had been placed in what their parents considered a hostile environment, to the "strong public interest in promoting diversity and

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308. *Id.* at 2504.

309. *Id.*

310. *See, e.g.*, 1970 N.Y. Laws 843 (authorizing a union free school district for the area owned by Blythedale Children's Hospital).

311. *Grumet*, 114 S. Ct. at 2506.

312. *Id.* at 2492.

understanding in the public schools."[313]

The children's interests, wrote Justice Stevens, would have been accommodated if "the State [had] taken steps to alleviate the children's fear by teaching their schoolmates to be tolerant and respectful of Satmar customs."[314] Such an approach would certainly have been the minimum in a setting where a hostile environment is found to have existed, and Justice Stevens was quite correct in noting that an "[a]ction of that kind would raise no constitutional concerns."[315] But the legislation at issue in *Grumet* went much further:

> Instead, the State responded with a solution that affirmatively supports a religious sect's interest in segregating itself and preventing its children from associating with their neighbors. The isolation of these children, while it may protect them from "panic, fear and trauma," also unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents' religious faith. By creating a school district that is specifically intended to shield children from contact with others who have "different ways," the State provided official support to cement the attachment of young adherents to a particular faith.[316]

For Justices Stevens, Blackmun, and Ginsburg, the issue was not "targeted accommodation" as such, or even the way the circumstances make it "look" (*viz.*, as a merger of civic and religious authority (Justice Souter),[317] nor was the issue a religious gerrymander (Justice Kennedy)).[318] Instead, the issue was the *effect* the accommodation had on the religious beliefs of those accommodated.[319] The accommodation in *Grumet* was unconstitutional, not only because it *looked* bad, but also because it actually *advanced* the religious agenda of the families involved.

Why this is a problem, however, is not explained. Just as "burdens" have the *effect* of "inhibiting" religious exercise, most religious accommodations have the *effect* of "advancing" the religious endeavors of those accommodated. The key, at least in most equal protection cases, is whether the intent is to discriminate on the basis of a suspect classification or to remedy some damage done by the government's action. In *Grumet*, it was conceded by all parties that there was a problem the New York courts had been unable to remedy and the Legislature intented to "fix."

2. Taking A Structural Approach: Do Courts Have Exclusive Jurisdiction to Accommodate?—Viewed structurally, the connection between the outcome in *Grumet* and the debates among the Justices in *Texas Monthly* and *Smith* is striking. The majority in both *Texas Monthly* and *Grumet,* viewed legislatures as having no business writing laws that accommodate the needs of specific, religiously-identifiable groups. If they do, the

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313. *Id.* at 2495 (Stevens, J., concurring, with whom Blackmun & Ginsburg, JJ., joined).

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 2488.

318. *Id.* at 2501 (Kennedy, J., concurring).

319. This was precisely the problem which caused Justice Douglas to dissent in Wisconsin v. Yoder, 406 U.S. 205 (1972). He viewed the *judicial* accommodation as one which provided official support for parents who raise their children in the Amish religious tradition. *Id.* at 240, 245-47.

intent of the statute is indistinguishable from its effect, and the law "advances" the religion accommodated. Justice O'Connor's concurring opinion makes this clear:

> There is nothing improper about a legislative intention to accommodate a religious group, *so long as it is implemented through generally applicable legislation.* New York may, for instance, allow all villages to operate their own school districts. *If it does not want to act so broadly, it may set forth neutral criteria that a village must meet to have a school district of its own; these criteria can then be applied by a state agency, and the decision would then be reviewable by the judiciary.*[320]

This is an interesting approach, but it completely avoids the question which so troubled Justices Stevens, Ginsburg, Breyer, and Souter. Their concerns centered on the fact that this legislative accommodation targeted the special needs of a religious group. Justice O'Connor, however, apparently believes that "[a] district created under a generally applicable scheme would be acceptable even though it coincides with a village which was consciously created by its voters as an enclave for their religious group." [321] By contrast, Justice Souter rejects this proposition outright, and Justices Stevens, Blackmun, and Ginsburg view legislative accommodations of *religiously*-based educational interests as "state action in aid of segregation."[322]

The *Grumet* case tells us that a majority of the Court would permit *some* legislative accommodation of specific burdens on religious belief or practice, but that all would scrutinize them "strictly" for evidence of discrimination or preference (Justices Rehnquist, Scalia, Thomas, Kennedy, and O'Connor), while three more Justices (Justices Blackmun, Stevens, and Ginsburg) would scrutinize the nature of the benefit received as well. Justices Souter and O'Connor clearly prefer that the case for accommodation be made by a judge who is presumably capable of tailoring the relief to a "concrete need" which appears in the record. This was what bothered the dissenters in *Grumet.*

The contrast between the majority and the dissenters in *Grumet* was as stark as that which appears in both *Texas Monthly* and *Smith.* Justices Scalia, Thomas, and Chief Justice Rehnquist, viewed the *majority's* approach as one which is discriminatory and "hostile" to religion.[323] They explained that *Grumet* was not a case involving the government subsidy of private schools or of religion, but one which questions the creation and legitimacy of a *public* school where the "only thing distinctive about the school is that all the students share the same religion."[324] In their view, the formation of the Village of Kiryas Joel simply continued a practice prevalent throughout the history of the United States—people of the same religious persuasion forming communities and establishing schools to serve them.[325]

These are strong words that pose the direct question: Can *any* legislature be clear about its intent to accommodate religion? *Grumet, Texas Monthly,* and other cases

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320. *Grumet,* 114 S. Ct. at 2498 (O'Connor, J., concurring) (emphasis added).

321. *Id.*

322. *Id.* at 2495 (opinion of Stevens, Blackmun, & Ginsburg, JJ.).

323. *Id.* at 2508 (Scalia, J., dissenting, with whom Rehnquist, C.J., and Thomas, J., joined).

324. *Id.* at 2506.

325. *Id.* at 2507-08.

involving legislative accommodation make it clear that, while a majority of the Court may be amenable in theory to legislative accommodations, it is not receptive in practice to legislative efforts to strike sensible balances between religious and non-religious interests. But there is one legislature left to whom the First Amendment itself guarantees access and petition for redress of grievances. Can Congress be the agent of change?

B. Statutory Protection for Religious Liberty: What is the Role of Congress?

1. Introduction: The "Religious Freedom Restoration Act."—The Religious Freedom Restoration Act (RFRA) contains an explicit congressional finding that the policy position enunciated by the Court in *Employment Division v. Smith* is not good public policy. But statutes like the proposed RFRA do more than indicate the sense of the Congress respecting disputed points of law; they stake an explicit claim to the power to resolve them.

Since all such power claims must rest on a fair reading of the text of the amended Constitution, Congress' power to enact a statute like RFRA must rest upon the powers enumerated in the Constitution itself or those conferred by later amendments.[326] Given the fact of incorporation, the assertion is that Section Five of the Fourteenth Amendment provides the jurisdictional basis for RFRA.

2. The Power of Congress to Define and Enforce the Fourteenth Amendment: The Relationship Between Section Five and Section One.—To assert that Section Five is the source of congressional authority to legislate with respect to the rights incorporated is to raise a number of significant questions, both structural and substantive. At the highest level of generality, the question may be phrased as follows: Does Section Five authorize Congress to legislate with respect to *all* constitutional norms arguably within the scope of the Citizenship, Due Process, Privileges and Immunities, and Equal Protection Clauses, or is congressional power limited to enforcing norms which are recognized as fundamental by judicial interpretation of Section One?

As applied to the specific issue of *religious* liberty, the question is: May Congress pass laws with the specific intent of protecting religious liberty from burdens caused by laws of general applicability, or is congressional authority under Section Five limited to empowering the judiciary to strike its own sensible balances between religious liberty and other important state and individual interests?

The Court's opinions in *Katzenbach v. Morgan*[327] and *Oregon v. Mitchell*[328] provide a useful backdrop against which to consider the structural difficulties inherent in developing a standard for reviewing the scope of congressional power to adopt laws protecting religious liberty. *Morgan* provides insights regarding the relationship of the normative content of the specific guarantees (non-establishment and no limits on free exercise) to the structural mechanisms the framers put in place to help insure that they would be respected (separation of powers and federalism).

The First Amendment's introductory phrase, "Congress shall make no law,"[329] has

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326. *See* United States v. Lopez, 115 S. Ct. 1624 (1995).

327. 384 U.S. 641 (1966).

328. 400 U.S. 112 (1970).

329. There is no logical way to confine this question to the First Amendment alone. All other rights

been interpreted by the Court to mean that "Congress[,] [the Executive, and the States] shall make no law [or enforce any policy]."[330] *Morgan* thus provides the backdrop for considering the separation of powers boundary between Congress and the Court when a dispute arises between them concerning the contours of the incorporated religious liberty guarantees. Put in structural terms, the question is whether the incorporated First Amendment should be interpreted to mean that neither "Congress[,] [the Executive, the Judicial Branch, nor the States] shall make [any] law [or enforce any policy]" which has as either its purpose or its effect the creation, maintenance, enforcement or application of a law or policy *respecting* an establishment of religion; or *prohibiting* the free exercise of religion; or *abridging* the freedoms of speech, press, peaceable assembly or petition for a redress of grievances.

Following the lead of most of the post-*Smith* legal scholarship which addresses the general contours of these questions, the two federal courts which have considered the constitutionality of RFRA, and reached opposite results, have concluded their respective analyses at this point.[331] They do so because they assume, as does the Supreme Court, that the structural locus of power to protect religious liberty has been vested in the federal government generally, and in the Court in particular. In *Flores v. City of Boerne*, the United States District Court for the Western District of Texas held that RFRA is unconstitutional because:

> According to the holding of *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is. . . ." "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."
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> . . . .
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> In this instance, Congress specifically sought to overturn Supreme Court precedent as found in *Employment Division v. Smith* through the passage of RFRA. . . . The Court is cognizant of Congress' Authority under Section 5 of the Fourteenth Amendment, yet is convinced of Congress' violation of the doctrine of Separation of Powers by intruding on the power and duty of the judiciary.[332]

In the District Court's view, this was because "RFRA only mentions the First Amendment as the empowering provision to change the burden of proof standard to compelling interest. . . . [And] the First Amendment is not an enumerated power of

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incorporated via the Due Process Clause are subject to the same structural evaluation.

330. *See generally* Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156 (1986).

331. *See* Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995) (holding RFRA unconstitutional as a violation of separation of powers and beyond the powers of Congress to enact); Belgard v. Hawaii, No. 93-00961, 1995 WL 170221, at *7 (D. Haw. Feb. 3, 1995) (holding RFRA constitutional pursuant to Congress' enforcement power under Section Five of the Fourteenth Amendment).

332. 877 F. Supp. 355, 356-57 (W.D. Tex. 1995) (citations omitted).

Congress, but merely a limitation . . . ."[333] As a result, the Court stated, "*Katzenbach v. Morgan* and its progeny are inapplicable."[334] Separation of powers controls the analysis because the First Amendment simply "does not empower Congress to regulate all federal law in order to achieve religious liberty, unless it is done pursuant to an enumerated power."[335]

The *Boerne* court thus accurately identifies the first of the structural questions: What are the source(s) of congressional power to protect religious liberty? But by viewing the First Amendment as a blanket limitation on the power of Congress to make laws concerning religious liberty the *Boerne* court ignores the second question: Whether the laws adopted by Congress under its plenary powers to regulate virtually every aspect of the federal government's operations are *consistent* with the powers granted and the limits imposed?

This is a critical omission. In order for any court to hold a statute unconstitutional there must first be a finding that Congress or a state has either exceeded the powers granted or transgressed a limit on powers it does have.[336] Since Congress clearly has the power to legislate civil rights protections in all fields otherwise subject to its lawmaking power,[337] the district court's view that the First Amendment is, or should be considered, the locus of congressional power to legislate on the topic of religious liberty is clearly wrong.[338] The First Amendment, if anything, is a structural limitation of the subject-matter of federal authority with respect to establishments of religion and laws prohibiting the free exercise thereof.

Also incorrect is the *Boerne* court's apparent view, which is shared by some commentators, that Section Five of the Fourteenth Amendment is not relevant in the absence of *another* specific source of congressional authority to legislate. Part III of this Article points out that the power granted by Section Five of the Fourteenth Amendment, "like all others vested in Congress, is complete in itself, [and] may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[339] Therefore, just as the Commerce power enunciated in *Gibbons v. Ogden* is plenary as to every matter within its scope, *United States v. Lopez* stands as a stark reminder that the limitations on Congress' Section Five power (and of the Court's power under the First and Fourteenth Amendments) are also "inherent in [its] very language."[340]

The language and history of the Fourteenth Amendment leave no doubt that Congress has the power to pass laws which will enforce the norms embodied in the Citizenship, Due Process and Equal Protection Clauses. It also has power both to define and enforce "privileges and immunities of citizens of the United States" which are otherwise consistent

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333. *Id.* at 357 n.1.

334. *Id.*

335. *Id.* (citing Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 363 (1994)).

336. *See* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

337. *See* United States v. Lopez, 115 S. Ct. 1624 (1995).

338. *See, e.g.*, Michael A. Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995).

339. *Lopez*, 115 S. Ct. at 1627 (*quoting* Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 196 (1824)).

340. *Id.*

with the Constitution.[341]

What then is left of the district court's rationale in *Boerne*? The answer is simple: consideration of the important structural questions of federalism and separation of powers. RFRA, it should be remembered, is an assertion of congressional authority to preempt contrary law at both the federal and the state levels. Since the analysis in *Katzenbach v. Morgan* is addressed primarily to the issue of separation of powers under the Fourteenth Amendment, the question for the Court is whether RFRA is consistent with both the First Amendment itself, *and* with the equality and equal citizenship norms of the Fourteenth Amendment.

I have yet to see an argument that RFRA violates the Establishment Clause which does not beg the very question to be decided: What is the relationship between the non-establishment and free exercise guarantees in light of the Fourteenth Amendment norms which give both clauses force over the states?[342] Most of the anti-RFRA arguments turn on the perceived effrontery of a Congress bent on restoring the pre-*Smith* balancing test embodied in the *Sherbert-Yoder* line of cases and giving it some teeth by placing the burden of proof on the government.[343] But this is precisely the wrong focus: "the Court cannot refuse to enforce a statutory right that Congress creates pursuant to one of its constitutional powers"[344] unless it violates either the Establishment or Free Exercise Clauses or the equal citizenship and protection norms embodied in the Fourteenth Amendment.

Because it would be impossible to argue that RFRA prohibits the free exercise of religion, and it certainly is not (at least in its present form) a law respecting an establishment of religion, the only legitimate arguments against the RFRA would be: 1) that it violates the equal protection norms contained in the Fourteenth Amendment itself;[345] 2) that it violates the Free Speech Clause;[346] or 3) that Congress has no power

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341. The requirement that the substantive understanding or interpretation of concepts such as "privileges and immunities" or "substantive due process" (including "incorporation" questions) should be consistent with the Constitution, taken as a whole, seems unexceptionable on its face. It does, however, present a number of interesting questions which, while relevant to the topics raised in this Article, must be reserved for discussion at another place and time. Among these are the questions of whether federalism, the "reverse incorporation" of the Fourteenth Amendment's Equal Protection Clause through the Due Process Clause of the Fifth Amendment (Bolling v. Sharpe, 347 U.S. 497 (1954)), and the Ninth Amendment should be viewed as structural limitations on the exercise of federal power under the Fourteenth Amendment.

As the discussion at notes 277 to 311 points out, reasonable minds can differ concerning the extent to which a community can or should accommodate the religious liberty interests of individuals (whether or not they are citizens). Utilizing the incorporated Establishment Clause or other fundamental rights to limit the power of local communities to strike balances between and among interests protected by the First Amendment, which are otherwise consistent with the demands of "equal citizenship," raises substantial federalism questions under the Ninth and Fourteenth Amendments.

342. *See, e.g.*, William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227, 237-42 (1995).

343. *See, e.g.*, Brant, *supra* note 12; *see also* Conkle, *supra* note 12 *and* Sager & Eisgruber, *supra* note 275.

344. Douglas Laycock, *RFRA, Congress & the Ratchet*, 56 MONT. L. REV. 145, 169 (1995).

345. *See* Marshall, *supra* note 342, at 242-43. I have serious problems with Marshall's analysis under the

under the Fourteenth Amendment to bind the states.

The following sections focus on the structural significance of the Fourteenth Amendment. Though its impact on the federal-state power equation with respect to race relations and other aspects of equal protection appears to be well-settled, a number of important substantive and structural issues which go to the heart of the Court's incorporation project, including preemption and separation of powers, remain open.

a. Katzenbach v. Morgan:[347] *The Fourteenth Amendment and separation of powers*.—The debate between the majority and the dissents in *Katzenbach v. Morgan* bears witness to the structural difficulties which lurk at the heart of the Fourteenth Amendment. Viewed structurally, the Amendment has four basic components: first, a series of norms which guarantee the rights and obligations of citizens and others lawfully within the jurisdiction of the United States or of any state;[348] second, an implicit recognition that the states are both empowered and obligated to protect the rights of citizens and others lawfully within their respective jurisdictions; third, an express grant of legislative power to Congress to enforce the norms enacted; and fourth, a set of specific disabilities to be imposed on those who violate their oaths of office or aid the rebellion.

Morgan illustrates the structural tension which exists between the legislative power of Congress and the judicial power of the Court discussed in Parts I, II and III of this Article.[349] At issue in *Morgan* was Congress' decision to prohibit English literacy tests as a voter qualification. In the view of Congress, all citizens who meet the literacy requirements "in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English,"[350] should be entitled to vote in both state and federal elections. The structural problem was twofold.

The first was an explicit example of text-based federalism: Article I, Section 2 and

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Equal Protection Clause, in part because it combines Establishment Clause arguments with those arising under the Equal Protection Clause. A full Equal Protection Clause analysis regarding the scope of congressional power to enforce the Fourteenth Amendment would require analysis of the norms enunciated by the Court itself. There is no question that some of the Court's decisions prefer, or can be viewed as endorsing, non-religion over religion, and they sometimes sacrifice the equal citizenship rights of individuals as a part of what appears to be a Solomonic attempt to strike sensible balances between the interests of believers to equal treatment, and the interests of dissenters to non-association. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985); Flast v. Cohen, 392 U.S. 83 (1968).

346. *See* Marshall, *supra* note 342, at 245-47. I have the same problem with Professor Marshall's free speech analysis. The Court's treatment of speech is content-based, and, on occasion, its rulings mandate viewpoint-based discrimination as well.

347. 384 U.S. 641 (1966).

348. *Cf.* Plyler v. Doe, 457 U.S. 202 (1982). Because it deals with persons who are illegally within the state, California's Proposition 187 will test the limits on federal preemption authority, as well as the privileges and immunities of *state* citizenship. *See, e.g.*, Wilson v. City of San Jose, No. C-95-0633 DLJ., 1995 WL 241452 (N.D. Cal. Apr. 14, 1995) (application of Proposition 187 to state welfare programs). *See also* Paul Feldman, *Judge Asked to Declare Prop. 187 Unconstitutional*, LOS ANGELES TIMES, May 2, 1995, at A3 (recounting developments in pending federal litigation).

349. *See supra* Part I.A.

350. 42 U.S.C. § 1973b(e)(2) (1988).

the Seventeenth Amendment reserve for the states the power to set voter qualifications "for the most numerous branch of the state legislature" and adopt those qualifications by reference as the qualifications for federal electors. In order to prevail against such a text-based claim, the express authority to enforce the non-discrimination norms of the Fourteenth and Fifteenth Amendments contained in their enforcement clauses[351] must empower Congress to preempt state regulations governing voter qualifications "for the most numerous branch of the state legislature."

The second problem was separation of powers. In *Lassiter v. Northhampton County Board of Elections*,[352] the Court held that North Carolina's English literacy requirement did not violate the Fourteenth and Fifteenth Amendments if applied uniformly and fairly to all citizens. It did recognize, however, that such tests could be, and had been, applied by the states in a manner which violated the Equal Protection Clause.[353] Congress disagreed with the Court's holding in *Lassiter*. The disagreement was not over the content of the equal protection norm of the Fourteenth Amendment, but was focused on the danger posed to certain classes of citizens by the English literacy tests used by a number of states as a prerequisite for becoming eligible to vote.[354]

The issue, properly framed in *Morgan*, was whether state power to define voter qualifications, expressly reserved in Article I, Section Two and the Seventeenth Amendment, should prevail against preemptive congressional legislation which was based on express powers to enforce the Fourteenth and Fifteenth Amendments, notwithstanding the Court's finding that the "literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage."[355]

Significantly, the State of New York did not argue in *Morgan* that Congress lacked the power to preempt all discriminatory voter qualifications. Given the Fifteenth Amendment, that argument would have been absurd on its face. New York's argument was instead more limited and rested on the Court's finding in *Lassiter* that literacy tests were not *per se* unconstitutional. In New York's view, the power of Congress concerning discriminatory state voter qualifications was not plenary; it was remedial. As such, congressional power was contingent on a prior *judicial* finding that there had been illegal conduct. In other words, New York would prevail unless and until someone could prove *to a judge* that its literacy test was discriminatory.

The federalism component of the argument rests on the premise that once the Court has spoken with respect to the legitimacy of a voter qualification, the states are free under Article I, Section Two and the Seventeenth Amendment to utilize it in an otherwise nondiscriminatory manner without fear that Congress might intervene. The implicit assumption appears to be that the congressional power embodied in the enforcement provisions of the Thirteenth, Fourteenth and Fifteenth Amendments is qualitatively different with respect to matters within their scope than the powers enumerated in Articles I through VI, such as the Commerce, Necessary and Proper, or Full Faith and Credit

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351. U.S. CONST. amend. XIV, § 5; *id.* amend. XV, § 2.

352. 360 U.S. 45 (1959).

353. The validity of North Carolina's literacy test "as applied" was not presented. *Id.* at 50.

354. At the time *Lassiter* was decided, nineteen states, including North Carolina, utilized literacy tests in this manner. The citations are collected in the Court's opinion. *See id.* at 52-53 n.7.

355. *Id.*

Clauses. The important question remains: How is it different?

The answer to this question depends upon the balance of power struck by the Fourteenth Amendment between the states and the Congress, on the one hand, and Congress and the Court on the other. Congress' power under the Fourteenth Amendment is clearly remedial.[356] The language of the Amendment itself is, for the most part, phrased in the negative. It therefore presupposes, quite logically, that an exercise of federal *lawmaking* authority will occasionally be necessary to control state officers and agencies.[357]

The Court's powers under the Fourteenth Amendment, however, are a bit more difficult to describe. As Justice Brennan explained in *Oregon v. Mitchell*:

> [T]he statements of Bingham and Howard in the text indicate, the framers of the [Fourteenth] Amendment were not always clear whether they understood it merely as a grant of power to Congress or whether they thought, in addition, that it would confer power upon the courts, which the courts would use to achieve equality of rights. Since § 5 is clear in its grant of power to Congress and we have consistently held that the Amendment grants power to the courts, this issue is of academic interest only.[358]

The argument in *Morgan*, however, was far from academic. It was quite sophisticated and of immense practical and political significance. Since we know that the Civil War Amendments federalized the subjects of equal citizenship and equal protection of the law by enacting a series of non-discrimination norms that are enforceable against the states by their own terms, federalism alone cannot be a plausible defense by a state to preemptive congressional legislation designed to eliminate state-sponsored discrimination on the basis of race, national origin or citizenship status. More is needed, but it cannot be found in the reserved powers of the states.

The only plausible argument which would exert a "check" on congressional authority beyond the powers explicitly reserved by the states is one that rests on separation of powers. Rather than assert that Congress does not have the power to ban devices which, in its view, have the potential to discriminate on the basis of race or national origin, New York's argument in *Morgan* was that the powers of Congress under the Thirteenth, Fourteenth, and Fifteenth Amendments are more limited in scope than those enumerated in Articles I through VI, and that the Court need not defer to Congress in the same manner as it does on the subjects within the scope of the Necessary and Proper Clause.[359] Viewed

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356. This is in accord with *The Civil Rights Cases* in which the Court concluded that congressional power under Section Five was, in fact, "remedial" in character. 109 U.S. 3 (1883). The Court held that Section Five does not "authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers when these are subversive of the fundamental rights specified in the amendment." *Id.* at 11.

357. *See* BERGER, *supra* note 190, at 226 (discussing Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1858), which held that the federal government had no "implied power to exercise any control over a state's officers and agencies").

358. Oregon v. Mitchell, 400 U.S. 112, 264 n.37 (1970).

359. Katzenbach v. Morgan, 384 U.S. 641, 647-49 (1966). There is, needless to say, a problem with such an argument: the text of the Necessary and Proper Clause itself. It provides that "The Congress shall have Power

in this fashion, the federalism argument made by New York has substance: Congress was overreaching its authority because the Court had already spoken on the matter.

(i) Equal Protection or Privileges and Immunities?—The argument that Congress was acting outside the scope of its authority to enforce the Equal Protection Clause is an interesting one for several reasons. First, Section Five is read without regard to the provision of the Fourteenth Amendment most directly relevant to the voting rights involved in the case: the Privileges and Immunities Clause. Puerto Ricans are citizens of the United States by birth and native born citizens need not demonstrate proficiency in either written or spoken English to maintain that status. New York State, however, considered language proficiency relevant to citizenship status. It claimed the right to deny the franchise, the most basic political right of the citizen, to adult citizens who were illiterate in English.[360]

What is remarkable about New York's constitutional provision conditioning the franchise on English literacy is that it was so clearly aimed at the immigrants who were flooding into New York and the rest of the country in the early 1920s. To the New York establishment, both native-born and naturalized non-English speakers residing in New York who had attained the age of majority were "foreigners" notwithstanding their status as "citizens of the United States and of the State wherein they reside."[361] In New York's view, "Citizens of New York" were American citizens who could read and write English.[362]

Such a reading obviously flies in the face of the Citizenship Clause of Section One. By operation of the Fourteenth Amendment, citizens of the United States are also citizens "of the State wherein they reside." Unlike the situation in *Oregon v. Mitchell*, where the voter qualification at issue (the necessity of attaining twenty-one years of age) was one mentioned by the Fourteenth Amendment,[363] the New York election laws (as well as the North Carolina laws upheld in *Lassiter*) were aimed squarely at those who sought to claim their rights as state citizens on the basis of their status as citizens of the United States. Thus, both *Lassiter* and *Morgan* are cases arising under the Citizenship and Privileges and Immunities Clauses.[364]

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers vested by this Constitution in the Government of the United States*, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18 (emphasis added). The powers vested by Article IV may be characterized as "Powers vested by this Constitution in the Government of the United States", so too are the powers vested in Congress by the enforcement clauses of the Amendments adopted pursuant to Article V.

360. *Morgan*, 384 U.S. at 644 n.2. The *Morgan* Court was faced with the problem of construing the New York Constitution which provided in relevant part:

> Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English.

N.Y. CONST. art. II, § 1.

361. U.S. CONST. amend. XIV, § 1.

362. *Cf.* Meyer v. Nebraska, 262 U.S. 390 (1923) (prohibiting instruction in languages other than English).

363. U.S. CONST. amend. XIV, § 2.

364. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), are not to the contrary. In *Slaughter-House*, the Court held that it would be "a little remarkable, if this clause was intended as a protection to the citizen

Though it clearly applied, the Privileges and Immunities Clause was not even mentioned in either *Morgan* or *Lassiter*. These cases serve as a stark reminder of the force ascribed to the Court's reading of the Clause in *The Slaughterhouse Cases*. The Solicitor General's fallback argument in *Morgan* was that denial of the franchise to those already citizens was tantamount to State denial of a republican form of government under Article IV, Section Four.[365] The Court characterized the case as one sounding in equal protection.

The practical impact of such a characterization was minuscule; the enforcement power of Congress is the same under both clauses. The theoretical impact of that characterization, however, is quite significant. Not only is it far easier as a practical and theoretical matter for a legislature to define the privileges and immunities of United States citizenship than it is to legislate or adjudicate the meaning of the phrase "equal protection of the laws," the former is a power committed by the text of the Constitution to Congress.[366]

When the issue is equal protection, however, the allocation of power made by the text is considerably less straightforward. Congress certainly has the power under both Article I and Section Five to provide whatever prospective guidelines might be necessary and proper to effectuate the guarantee. Under Article III and *Marbury*,[367] it is the Court's role to determine whether or not a given action by a state or the federal government is consistent with the equal protection norm or the legislation adopted to enforce it. Thus, what is commonly understood to be the meaning of the norm is derived at any given point in time from the manner in which the law is understood by Congress, enforced by the executive, and applied by the judiciary. Yet once a specific controversy is resolved in a manner which is arguably within the scope of the discretion granted to the branch resolving it (i.e., by legislation or judgment), that resolution will inevitably have an impact on the manner in which the right is understood by the other branches and by the states.[368]

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of a State against the legislative power of his own State, [and] that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it." *Id.* at 74. In *Lassiter* and *Morgan*, the legislative power of the state had singled out a class of United States citizens who had been naturalized by operation of constitutional and statutory law, and attempted to deny them the rights of state citizenship. In effect, the message was that these non-English literate "newcomers" were not (and could not become) members of the class known collectively as "the people" (i.e., the electorate) until they became literate in English. *See* THE FEDERALIST NOS. 39, 57 (James Madison) (commenting on the nature of republicanism).

As a result, I believe the Court's decision in *Lassiter* is wrong. In *Lassiter*, the Court relied on a Massachusetts case, *Stone v. Smith*, for the proposition "that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage." 34 N.E. 521, 521 (Mass. 1893). Although such laws might be justified by reference to non-discriminatory reasons, the fact remains that they do trench upon important federal interests in "a uniform Rule of naturalization." U.S. CONST. art. I, § 8, cl. 4.

365. Katzenbach v. Morgan, 384 U.S. 641, 647 n.5 (1966).

366. U.S. CONST. art. I, § 8, cls. 4, 18; *id.* art. IV, § 4; *id.* amend. XIV, §§ 1, 5. A recent discussion of this very point occurs in Justice Kennedy's concurring opinion in U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

367. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 144 (1803).

368. Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995).

Thus, when the Court determines, as it did in *Lassiter*, that literacy tests do not by their nature violate the equal protection guarantee, the ruling imparts to the Equal Protection Clause a definitional "gloss" that inevitably limits the discretion of Congress to actions inconsistent with the Article III power of the Court to resolve such controversies.[369]

The same analysis holds true when Congress has made a determination which is within the scope of its authority. Notwithstanding that, at least for the present, the Clause remains (in the words of Professor Amar) an infant "strangled in its crib,"[370] cases arising under the Privileges and Immunities Clause provide a useful comparison. Since Congress controls the scope of the privileges and immunities which inhere in United States citizenship but are not specified in the Constitution itself, the role of the Court in privileges and immunities cases would be limited in most cases to exploring the nexus of the asserted privilege or immunity to the status of "citizen of the United States." In fact, this is precisely what the Court did in *The Slaughterhouse Cases*.[371]

From this it is possible to derive a subtle but obvious point: Constitutional "rights," including equal protection, cannot be understood without reference to the separation of powers and federalism issues which lie at heart of the amended Constitution. Thus, it is with this structural insight in mind that we must now turn to the equal protection analysis utilized by the Court in *Katzenbach v. Morgan*.

(ii) The power to define the equal protection norm.—At least to the extent that congressional action deals with the evils at which the Civil War Amendments were directed, the majority opinion in *Katzenbach v. Morgan* can be read as an affirmation that Section Five "grant[s] to Congress [the] same broad powers expressed in the Necessary and Proper Clause."[372] For the majority, the ultimate question was whether Congress could validly be enforcing the constitutional norm.[373]

In contrast, the dissenting opinion of Justice Harlan in *Morgan* collapses the structural question (whose power?) into the normative one (what limit?). Believing that "the Court has confused the issue of how much enforcement power Congress possesses under [Section] 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature,"[374] Justice Harlan's opinion proceeds from the premise that once the Court has ruled with respect to the application of the non-discrimination norm to a specific set of facts, the normative and structural aspects of equal protection cannot be distinguished. Both aspects are viewed as a single question concerning the separation of powers:

> The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement of that constitutional command . . . . That question is one for the judicial branch ultimately to determine. . . . In effect the

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369. *Id.*

370. Amar, *supra* note 165, at 1259.

371. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872).

372. Katzenbach v. Morgan, 384 U.S. 641, 650 n.9 (1966).

373. *Id.* at 651 n.10.

374. *Id.* at 666 (Harlan, J., with whom Stewart, J., joins, dissenting).

> Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the substantive scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court. In all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred, and the final decision is one of judgment. Until today this judgment has always been one for the judiciary to resolve.[375]

But the majority in *Morgan* did not agree that the need for the legislation must first be established to the satisfaction of the judicial branch. Congress' power to enforce the norm is not contingent, but rather plenary with respect to issues falling within its scope.[376] The key finding, wrote Justice Brennan, is whether the substance of the legislation is consistent with the constitutional norm as understood by the Court:

> [Section] 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.[377]

Justice Brennan had the better part of the argument insofar as it turns on the specific facts of *Morgan*. The Fourteenth and Fifteenth Amendments gave Congress legislative jurisdiction over both the subject matter (the rights of citizens of the United States and non-discrimination on the basis of race with respect to voting rights) and the offending party (the State of New York). Since there was no disagreement over the content of the applicable non-discrimination norm itself, the question in *Morgan* was whether Congress could utilize its fact-finding ability and enforcement authority to reach a conclusion arguably at odds with a decision of the Court respecting the proper application of that norm.

Though the majority was correct in its finding that Congress could validly preempt the field if it could rationally conclude that such tests were rooted in a discriminatory conception of what it means to be a citizen, it is the dissenting opinion in *Morgan* which most clearly articulates the relationship between norm and structure. It should be remembered that the Fourteenth Amendment was created for several purposes. The most important was to grant to both Congress and the states the explicit power to protect human and civil rights of all citizens and legal residents. The existence of such a power has been questioned not only by some of the states but also by the Supreme Court in *Dred Scott*.[378] It is against this historical background that Justice Harlan's position with respect to the power of the states and the Court should be read.

The issue in *Morgan* was not discrimination on the basis of race or national origin. Instead, it was a dispute over a congressional judgment that a general rule protecting

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375. *Id.* at 667-68.

376. United States v. Lopez, 115 S. Ct. 1624 (1995).

377. *Morgan*, 384 U.S. at 651 n.10.

378. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).

individuals from the possibility of race or national origin discrimination is more appropriate (i.e., "necessary and proper") as a resolution of an admitted social problem (the discriminatory use of literacy tests by some jurisdictions) than the case-by-case adjudication generally preferred by states and some members of the Court.[379] RFRA raises precisely these same issues.

The question before the Court in *Morgan*, and the question decided by the United States District Court in *Flores v. City of Boerne*,[380] was whether the structural concepts of federalism or separation of powers authorize either the states or the Court to second-guess the necessity or propriety of an otherwise rational, non-discriminatory congressional choice of means to effectuate the Fourteenth Amendment's normative commands. The majority in *Morgan* seemed instinctively to grasp (for it is not developed by them to any greater degree) that there are important structural protections which lie at the heart of the Civil War Amendments. Though "the People" themselves selected the ends by adopting the Fourteenth Amendment, they empowered Congress to select the means by which they were to be implemented. The "ratchet theory" in footnote ten is a relatively simple, if inartistic, way to express the substantive concern that the power to choose the means to an otherwise legitimate end does not include the power to pursue an end which is inconsistent with the norm to be enforced.[381] What remains to be determined is what happens when the Court and Congress disagree concerning the meaning of the relevant constitutional norms.

b. Oregon v. Mitchell:[382] *The Fourteenth Amendment and federalism.*—When Congress attempts to reject or modify a constitutional holding of the Court, the problem is far more difficult than that which was presented in *Morgan*. Structural analysis is the only possible method of resolving such a controversy. When the norms Congress seeks to reject or modify are those embodied in the concepts of federalism and separation of powers, the structural problem is apparent from the face of the Constitution itself.

Mitchell contains the most clearly articulated discussion by the Court of the relationship between the structure of federalism, separation of powers, and the normative content of the Fourteenth Amendment when there is a disagreement concerning the content of the norm to be enforced, and Congress is claiming the power to resolve the dispute under an express grant such as that provided in Section Five of the Fourteenth Amendment. Like *Katzenbach v. Morgan*, *Mitchell* involved legislation that preempted state laws governing voter qualifications. In *Mitchell*, however, Congress did not act

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379. This is why affirmative action cases provide such an interesting contrast. Justice Brennan's last opinion as a member of the Court, Metro Broadcasting v. FCC, 497 U.S. 547 (1990), divided the Court on virtually the same lines as those articulated by Justice Harlan in *Morgan*, but there is one critical difference: the allegation in *Metro Broadcasting* was that the congressional action was *not* consistent with *any* of the constitutional norms that the challenged policy—a minority set-aside in broadcast licensing—was attempting to protect. Unlike the situation in *Morgan* where there was a fair amount of agreement on the content of the applicable constitutional norms, *Metro Broadcasting* indicates that there is substantial disagreement over both the content of the norms themselves and the roles of both the Court and the Congress in enforcing and defining them.

380. 877 F. Supp. 355 (W.D. Tex. 1995).

381. *Morgan*, 384 U.S. at 651 n.10.

382. 400 U.S. 112 (1970).

either to prevent or to remedy discrimination on the basis of race or ethnic ancestry. Instead, it extended the right to vote in all elections (state and federal) to citizens between the ages of eighteen and twenty-one, and it abolished state durational residency requirements as applied to voting in presidential elections.[383]

In *Mitchell*, the relevant norms are those which reserved state power over the qualifications of electors in congressional elections.[384] They are: the Regulations Clause of Article I, Section Four;[385] the Necessary and Proper Clause;[386] the provisions of Article II, Section One that govern the qualifications of presidential electors;[387] Sections One, Two and Five of the Fourteenth Amendment;[388] and Amendments Fifteen, Seventeen and Twenty-four.

The Court was badly divided as to both reasoning and result, but the issue was clearly framed: Do any of the express powers of Congress, including Section Five of the Fourteenth Amendment, grant it the power to define the qualifications for voters in state and federal elections notwithstanding the express language of Article I, Section Two and the Seventeenth Amendment stating that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature?"

Because this is inherently a structural question and is similar to the structural questions "glossed over" in the incorporation of the Religion Clause, the discussion which follows emphasizes the "structural" logic of each of the contending viewpoints within the Court. It is organized around the following questions:[389]

> 1) Does the amended Constitution expressly reserve for the states legislative jurisdiction with respect to the specific subject matter at issue (i.e., voter qualifications)?
>
> 2) Does the amended Constitution expressly grant Congress legislative jurisdiction over the same subject matter and thus require that the provisions be read together in order to define both the reservation of state power and the grant of federal legislative jurisdiction?
>
> 3) Does the amended Constitution contain other, more generalized, authorizing or prohibiting norms which might fairly be construed by the Court to limit either the power of the states or that of Congress with respect to the subject matter at issue?

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383. Voting Rights Amendments of 1970, Pub. L. No. 92-285, 84 Stat. 314.

384. U.S. CONST. art. I, § 2; *id.* amend. XVII.

385. "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but Congress may at any time by Law make or alter such Regulations*, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1. (emphasis added).

386. *Id.* art. I, § 8, cl. 18.

387. *Id.* art. II, § 1; *id.* amend. XII.

388. *Id.* amend. XIV.

389. The application of these questions to a structural analysis of the first amendment is contained in the text *infra* Part IV.C.1-4.

4) If such norms exist, to what extent should they be interpreted to authorize preemptive federal policy-making, either by Congress or the Court?

These same questions are relevant when Congress attempts to legislate with respect to religious freedom and will be addressed immediately following the discussion of *Oregon v. Mitchell.*

(i) Justice Harlan: The Fourteenth Amendment as defined by the intent of its framers.—Justice Harlan's opinion in *Oregon v. Mitchell* readily lends itself to an analysis framed in structural terms. The power to set voter qualifications is expressly reserved to the states by Article I, Section Two, as well as the Tenth and Seventeenth Amendments, and it is expressly qualified by the powers conferred on Congress by Section Four of Article I, Section Two of the Fourteenth Amendment, and the Fifteenth, Nineteenth and Twenty-Fourth Amendments.[390] Reading these provisions together in light of the history of the Fourteenth Amendment itself, Justice Harlan concluded that, except to the extent that state voter qualifications conflict with the clearly articulated prohibitions against race, sex, and poll tax qualifications set forth in the Constitution itself,[391] the states retained the power to set them:

> No one asserts that the power to set voting qualifications was taken from the States or subjected to federal control by any Amendment before the Fourteenth. The historical evidence makes it plain that the Congress and the States proposing and ratifying that Amendment affirmatively understood that they were not limiting state power over voting qualifications. The existence of the power therefore survived the amending process, and, except as it has been limited by the Fifteenth, Nineteenth, and Twenty-fourth Amendments, it still exists today.[392]

Justice Harlan conceded that such a structural interpretation "may well foreclose the possibility that Section Five empowers Congress to enfranchise a class of citizens so that they may protect themselves against discrimination forbidden by the first section."

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390. Oregon v. Mitchell, 400 U.S. 112, 154, 202 (1970) (opinion of Harlan, J.).

391. *Id.* at 154.

392. *Id.* at 201-02 (opinion of Harlan, J.). Justices Brennan, White, Marshall, and Douglas took precisely the opposite view, reading the history as follows:

> [T]he evidence suggests an alternative hypothesis: that the Amendment was framed by men who possessed differing views on the great question of the suffrage and who, partly in order to formulate some program of government and partly out of political expediency, papered over their differences with the broad, elastic language of § 1 and left to future interpreters of their Amendment the task of resolving in accordance with future vision and future needs the issues that they left unresolved. Such a hypothesis strikes us as far more consistent with the turbulent character of the times than one resting upon a belief that the broad language of the Equal Protection Clause contained a hidden limitation upon its operation that would prevent it from applying to state action regulating rights that could be characterized as "political."

Id. at 274-75 (opinion of Brennan, White, & Marshall, JJ.) (footnote omitted). *See also infra* note 410 and accompanying text.

However, he felt that it was "unnecessary for [him] to explore that question"[393] in *Mitchell* because, in the final analysis, he did not believe that discrimination against individuals who had not reached the age of twenty-one was prohibited by the Fourteenth Amendment.

From that point on, the rest was easy. To the extent that the equal protection norm was not violated, there was no congressional warrant to invade the retained powers of the states, even if the Congress found as a fact that there was unequal treatment on the basis of age. Like the factually unassailable findings of a court which lacks subject-matter jurisdiction, congressional findings on a topic beyond its competence are entitled to no deference at all.[394] "Judicial deference is based, not on relative fact-finding competence, but on due regard for the decision of the body constitutionally appointed to decide."[395] Thus, as applied to the First Amendment, Justice Harlan's approach raises the question as to which branch of government has the power to make preemptive rules respecting an establishment of religion or guaranteeing the free exercise thereof; Congress, the Court, or the states?

(ii) Justice Black: The Fourteenth Amendment and "structural" federalism.—Justice Black's approach might be called "functional federalism."[396] He found the requisite grant of authority to sustain Congress' extension of the franchise to eighteen to twenty year-olds in the Regulations Clause of Article I, Section Four.[397] By reading this language as a grant "to make or alter regulations in national elections, including the qualifications of voters,"[398] Justice Black construed the express reservation of state power contained in Article I, Section Two and the Seventeenth Amendment as one defined and limited by overarching federal concerns—including equality.[399] Therefore, Congress has "ultimate supervisory power" over federal elections.[400]

State elections, however, were another matter for Justice Black. Because "[n]o function is more essential to the separate and independent existence of the states and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices,"[401] Justice Black believed that the Tenth Amendment reserved at least that power to the states.[402] That reservation, in conjunction with what he viewed as the clear textual implication from Article I, Sections Two and Four, that Congress had regulatory power only over the conduct of federal elections, led him to conclude that Congress was never granted the authority to make

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393. *Mitchell*, 400 U.S. at 212 (opinion of Harlan, J.).

394. *Accord* United States v. Lopez, 115 S. Ct. 1624 (1995).

395. *Mitchell*, 400 U.S. at 207.

396. This was also the approach taken by the Court in U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

397. With one qualification (later made irrelevant by the Seventeenth Amendment), Section Four grants Congress the power to alter the "Times, Places, and Manner of holding Elections for Senators and Representatives" which have been set by the state legislatures. U.S. CONST. art. I, § 4, cl. 1.

398. *Mitchell*, 400 U.S. at 121.

399. *Id.* at 122-24 & n.5.

400. *Id.* at 124.

401. *Id.* at 125.

402. *Accord* New York v. United States, 505 U.S. 144, 155-83 (1992).

general regulations for the conduct of state elections. Its authority was more limited and was defined by the Fourteenth, Fifteenth, Nineteenth and Twenty-Fourth Amendments.[403]

For Justice Black, the determinative question was the relationship of structural federalism to the normative content of the Equal Protection Clause:

> [T]ypical equal protection cases . . . are not relevant or material to our decision in [the] cases before us. The establishment of voter age qualifications is a matter of legislative judgment which cannot be properly decided under the Equal Protection Clause. The crucial question here is not who is denied equal protection, but, rather, which political body, state or federal, is empowered to fix the minimum age of voters.[404]

For present purposes, the important lesson to draw from Justice Black's opinion is how he views the nature of the rights protected by the Fourteenth Amendment. For Justice Black, the content of the equal protection norm of the Fourteenth Amendment is to be defined by reference to three criteria:

> 1) the nature of the evil that it was intended to eliminate (racial or other forms of discrimination which have no rational connection to legitimate governmental purposes);
>
> 2) its impact on the structure of federalism; and
>
> 3) its relationship to other constitutional norms.

This is why, according to Justice Black, "typical Equal Protection cases" are neither relevant nor material when Congress attempts to legislate in an area exclusively reserved for the states.[405]

When a power is explicitly reserved for the states, the legitimacy of congressional action is contingent on legislative findings that the challenged policy is discriminatory on the basis of a characteristic which is repugnant to the Fourteenth or Fifteenth Amendments. If, "[o]n the other hand, Congress legislates in a domain not exclusively reserved by the Constitution to the States, its enforcement power need not be tied so closely to the goal of eliminating discrimination on account of race."[406] In the end, the limitation is federalism itself. As Justice Black explained:

> Amendments Fourteen, Fifteen, Nineteen, and Twenty-four, are examples of express limitations on the power of the States to govern themselves. And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous. My brother Brennan's opinion, if carried to its logical conclusion, would, under the guise of insuring equal

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403. This view of congressional authority is generally in accord with the Court's position on this topic in The Civil Rights Cases, 109 U.S. 3 (1883). *See supra* text accompanying note 356.

404. *Mitchell*, 400 U.S. at 127 n.10.

405. *Id.*

406. *Id.* at 130.

> protection, blot out all state power, leaving the 50 States as little more than impotent figureheads. In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history.[407]

Since the supervision of federal elections and the elimination of certain forms of discrimination with respect to voting are federal functions, the power to preempt state electoral qualifications inconsistent with federal policy must, in Justice Black's view, rest with Congress.[408] Just as with Justice Harlan, the question was one of subject matter jurisdiction, not one of individual rights. This is why the term "functional federalism" is a good description of Justice Black's position.

As applied to the incorporated First Amendment, Justice Black's position most clearly articulates the relationship of the jurisdictional norms of the First Amendment and the prohibitory norms of the Fourteenth. With respect to matters involving religious liberty, his opinion in *Mitchell* can be read as an assertion that the Fourteenth Amendment provides for a limited judicial role and a more active role on the part of the states and Congress.

(iii) Justice Stewart, Chief Justice Burger, and Justice Blackmun: The Fourteenth Amendment and the legislative jurisdiction of Congress.—In *Mitchell*, Justice Stewart wrote an opinion concurring in part and dissenting in part in which Chief Justice Burger and Justice Blackmun joined. The opinion attempted to strike a middle ground between the structuralism of Justices Black and Harlan, and the normative focus of Justice Brennan. The result was an opinion which had a number of divergent threads.

Perhaps the best way to begin is by noting that, like Justices Harlan and Black, Justice Stewart viewed the express reservation of state authority over voter qualifications to be a significant structural impediment to a broad assertion of federal power to alter them. Although the legislative (subject matter) jurisdiction was granted to Congress under the Equal Protection and Enforcement Clauses of the Fourteenth Amendment, both the Equal Protection and Enforcement Clauses are stated in general terms and do not expressly negate the reserved state powers at issue.[409] Though such jurisdiction might exist in a proper case, Justice Stewart viewed the judicial task as one of identifying the factors that create federal subject-matter jurisdiction.

His disagreement with Justice Brennan appears to rest upon two observations. The first is the scope of the Equal Protection Clause, which he viewed as designed only to protect discrete and insular minorities.[410] The second and more important criterion is what

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407. *Id.* at 125-26.

408. Justice Black does not deal with the power of the states to set the qualifications for presidential electors under Article II, Section One. Though they perform a federal function, their qualification and appointment is reserved for the states.

409. *Mitchell*, 400 U.S. at 287-92.

410. *Id.* at 296. Justices Brennan, White, and Marshall, by contrast, make it clear that they "believe there is serious question whether a statute granting the franchise to citizens 21 and over while denying it to those between the ages of 18 and 21 could, in any event, withstand present scrutiny under the Equal Protection Clause." *Id.* at 240.

he viewed as the contingent nature of congressional authority under Section Five of the Fourteen Amendment. For Justice Stewart, that power was limited to eradicating situations which, in the judgment of the Court, amounted to a violation of the Equal Protection Clause.[411]

Although Justice Stewart agreed with Justice Brennan that Congress has broad authority over matters falling within the scope of the Fourteenth Amendment *as construed by the Court*,[412] he did not believe that Congress had the authority to adjust the normative content of the Amendment, either to "ratchet up," as footnote ten of Justice Brennan's opinion in *Morgan* seems to suggest is permissible, or "down," a point on which all members of the Court agree. For Justice Stewart the key inquiry is the content of the constitutional norm itself; the Equal Protection Clause simply did not govern the case. Age is a voter qualification contained in the Fourteenth Amendment.[413] For that reason, it cannot be viewed as either an invidious or irrational voter qualification. Given this conclusion, the reserved power of the states was controlling.[414]

As applied to the incorporated First Amendment, Justice Stewart's position illustrates the potential for conflict between the Court's interpretation of the Due Process Clause, which is the conduit for the First Amendment, and Congress' views concerning the proper application of the equal protection and citizenship norms of the Citizenship, Privileges and Immunities, and Equal Protection Clauses.

(iv) Justices Brennan, White, Marshall, and Douglas: The Fourteenth Amendment as a grant of plenary federal authority.—The opinions of Justices Brennan (who wrote for himself, Justice White, and Justice Marshall) and Justice Douglas were focused on "the scope of congressional power under § 5 of the Fourteenth Amendment," as interpreted by the Court.[415] The remainder of the analysis proceeds from that perspective.

Since Congress' power under Section Five is express, Justice Brennan opined that "it is no answer to say that [the challenged act of Congress] intrudes upon a domain reserved to the States"; the federal power is plenary with respect to all cases falling within its

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411. *Id.* In this respect, his views in *Mitchell* mirror those he advanced in *Morgan*.

412. *Id.* at 293-96 (Stewart, J., concurring and dissenting, with whom Burger, C.J., and Blackmun, J., joined).

413. *Id.* at 249 n.14 (citing U.S. CONST. amend. XIV, § 2). He might also have noted, in response to Justice Brennan's assertions concerning the qualifications of office-holders, *see infra* text accompanying note 419, that the Constitution itself discriminates on the basis of age with respect to qualification for federal office-holders as well. U.S. CONST. art. I, § 2, cl. 2 (Representatives must be at least 25 years of age); *id.* art. I, § 3, cl. 3 (Senators must be at least 30 years of age); *id.* art. II, § 1, cl. 5 (President must be at least 35 years of age).

414. Justice Stewart's conclusions concerning durational residency requirements follow the same pattern. Since the Court had held the right of interstate travel to be one of the "Privileges and Immunities of citizens of the United States," Congress was empowered to legislate on the topic by the Necessary and Proper Clause "without reference to § 5." *Mitchell*, 400 U.S. at 286. The result and rationale would arguably be the same were Congress to eliminate other durational residency requirements, including those limiting access to the state ballot. A more interesting question would be presented were Congress to justify abolition of durational residency requirements on the basis that it was enforcing the *State* Citizenship Clause of the Fourteenth Amendment. *Cf.* Sosna v. Iowa, 419 U.S. 393 (1975).

415. *Mitchell*, 400 U.S. at 241, 246 (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).

ambit.[416] Read together, the separate opinions of Justices Brennan and Douglas agree that where either Congress or the Court could rationally conclude on the basis of the evidence before them that state action violates the Fourteenth Amendment, the states have no reserved power.[417]

An appropriate analogy is the Commerce Clause as it was understood by many courts and commentators prior to the Supreme Court's recent holding in *United States v. Lopez*.[418] Just as Congress was free under that interpretation of the Commerce Clause to substitute its judgment for otherwise rational and non-discriminatory state legislation (or the judgment of the Court with respect to the nature or existence of a "burden" on interstate commerce), it was also free, in the view of these Justices, to utilize its best judgment concerning the shape and scope of federal policy governing both equal protection and the privileges and immunities of national citizenship.

From a structural standpoint, the most interesting aspect of these opinions is that neither Justice Brennan nor Justice Douglas dealt with the express language of the Seventeenth Amendment which explicitly reaffirms, after the adoption of the Fourteenth Amendment, the power of the states reserved in Article I, Section Two. Though there is no question that the general language of the Equal Protection Clause can be read to cover voter qualifications, Justice Brennan's discussion regarding the need of the Fourteenth Amendment's drafters to be vague with respect to its impact on that subject illustrates only that the language is general. It does not illustrate how it meshes with other relevant provisions.

By contrast, Article I, Section Two, and the Fifteenth, Seventeenth, Nineteenth, and Twenty-Fourth Amendments are specific and deal with the same subject as Section Two of the Fourteenth Amendment: "the Qualifications for Electors of the most numerous Branch of the State Legislature." Whatever the reason for, and impact of, the vagueness which might lurk within the language of Section One of the Fourteenth Amendment, Section Two and later enactments are specific and address both the remedies for, and the permissible limits of, state power to define the qualifications of "electors of the most numerous Branch of the State Legislature."[419]

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416. *Id.* at 250 (citing *Ex parte* Virginia, 100 U.S. 339, 347-48 (1880) (Brennan, White, and Marshall, JJ., concurring and dissenting)); *id.* at 142-43 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (Douglas, J., concurring and dissenting)).

417. *See id.* at 236-39, 242-46 (Brennan, White, and Marshall, JJ., concurring and dissenting) (voting to uphold Congress' decision to eliminate the durational residency requirement as a legitimate exercise of its authority to make policy which enforces the Court's Fourteenth Amendment jurisprudence); *id.* at 144 (Douglas, J., concurring and dissenting).

418. United States v. Lopez, 115 S. Ct. 1624 (1995).

419. Justice Brennan defends his substantive conclusions by focusing on state power to set the qualifications of state office-holders, and notes the obvious: that the Equal Protection Clause "applies on its face to all assertions of state power, however made." *Mitchell*, 400 U.S. at 251. Though arguably critical to the preservation of state powers of self-governance, the power to set such qualifications was *not* expressly referenced in the Constitution; rather, it falls within the general reservation of state power in the Tenth Amendment. Justice Brennan's argument to the effect that, if Justice Harlan's interpretation of the Fourteenth Amendment were to be accepted, states could encourage racially motivated voting patterns for state office-holders, is actually directed more to the Tenth Amendment argument of Justice Black than it is to the Fourteenth Amendment argument of

Because there is no question that the evolutionary development of the language of the Constitution itself is a significant indicator of its meaning, especially where amendments are expressly designed to overturn the constitutional rulings of the Court,[420] the opinions of Justices Brennan and Douglas raise at least two significant structural questions. The first is a subtle one and relates to the Court's selective use of history. Even if, as Justices Douglas and Brennan seem to suggest, "the history of the Fourteenth Amendment tendered by [Justice] Harlan is irrelevant to the present problem,"[421] these Justices do seem to agree that the "original intent" is relevant when the issue is one of power rather than specific interpretation. Otherwise, they could not "conclude that its framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations."[422]

Because there is no question concerning the doubts of the framers of the Fourteenth Amendment about the wisdom of trusting the Court to be the ultimate interpreter of the application of that Amendment's equality principles, it is important to recognize that precisely the same distrust of preemptive federal power animated the jurisdictional prohibitions of the First Amendment. The Court's selective use of history in cases arising under the Religion Clauses, which I have criticized elsewhere,[423] tends to support its assumption of the power to make preemptive rules which attempt to balance the relationship between law and religion, religion and non-religion, and believers and dissenters. Rarely, does the Court focus on the intended effect its theories have on relationships between government and individual citizens.

The second structural point is more straightforward and builds on the first. Even if one assumes that the framers of the Fourteenth Amendment intended to grant Congress and the Court the power to interpret its language "in accordance with the vision and needs of [future] generations,"[424] there remains the question which lies at the heart of this Article: To what extent do Articles V and VI permit either the Court or Congress to construe constitutional norms in a manner which appears to be at odds with the express language or settled interpretations of other provisions of the Constitution itself?[425]

This observation is particularly relevant with respect to the Court. While the

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Justice Harlan. *Id.* at 250-52. The arguments of Justices Black, Harlan, and Stewart with respect to the states' reserved power to set the qualifications of "electors of the most numerous Branch of the State Legislature" simply do not speak to other ways in which a state might inject racial and other forms of discrimination into the political process. Rather, they utilize the text, structure, and history of the Constitution to determine the *contextual* meaning of the general prohibitory norm at issue.

420. *But see id.* at 136 (opinion of Douglas, J.); *id.* at 241-47, 275-76 (opinion of Brennan, White, and Marshall, JJ.).

421. *Id.* at 140 (opinion of Douglas, J.).

422. *Id.* at 278 (opinion of Brennan, White, and Marshall, JJ.).

423. *See generally* Destro, *supra* note 14.

424. *Mitchell*, 400 U.S. at 139-40 (opinion of Brennan, J.).

425. *Cf.* Irving A. Gordon, *The Nature and Uses of Congressional Power under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 Nw. U. L. Rev. 656 (1977) (arguing that Congress may not alter the "normative content" of a judicial decision, but that it may find facts ("the empirical content") which cast doubt on its continuing validity).

judiciary is certainly the branch most likely to aggrandize its own power by encroachment upon the prerogatives of the Congress, executive branch, and the states, both Congress and the executive branch have acted boldly in the field of individual rights when these branches had sufficient political power. Their inaction on such matters can largely be traced to the political dynamics which are the heart of Articles I and II. The same cannot be said of the Court, whose members, once confirmed, are insulated by their life tenure from the vagaries of the political process.

This point was not lost on the Reconstruction Congress. The framers of the Fourteenth Amendment, Bingham, Howard, and Sumner in particular, would have blanched at the thought that, by adopting an amendment to give Congress and the states the power to set a federal "floor" on the protection of civil rights, they might be empowering the Court (especially one led by Roger Taney) to claim either an exclusive power to define those rights using language that would be "in accordance [with the] vision and needs of [future] generations,"[426] or a more limited (though equally significant) power to set arbitrary "ceilings" on the rights.[427] This is why the power of the Court under the Fourteenth Amendment is not, as Justice Brennan held, an "issue of academic interest only";[428] it is one of immense political and constitutional significance.

C. Congress and the Power to Make Laws "Respecting an Establishment of Religion or Prohibiting the Free Exercise thereof."

We are now ready to look at the structural issues presented when Congress, the states, and the Court disagree concerning the "just bounds" between law and religion. Because such disagreements sound in both separation of powers and federalism, the same questions which arose in the analysis of *Morgan* and *Mitchell* are relevant here.

The First Amendment, it should be remembered, embodies both substantive and structural (federalism) norms. It is Congress which shall make "no law respecting an establishment of religion, or prohibiting the free exercise thereof." It is Congress which is forbidden to "abridg[e] the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." And it is the job of Article III courts to respect and enforce those rules against Congress.

But the first step is to determine what those rules mean by attempting to elicit their plain meaning. It is clear from the language alone what Congress cannot do. Neither Congress, the President, nor the Supreme Court may make or enforce policy having the force of law:

1) *respecting* an establishment of religion; or

2) *prohibiting* the free exercise of religion; or

3) *abridging* the freedoms of speech, press, peaceable assembly or petition for

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426. *See supra* text accompanying note 425.

427. *See* Robert A. Destro, Review Essay, *The Supreme Court, the "Facts of Life," and the Moral Sensibilities of "the Thoughtful Part of the Nation,"* 20 HUM. LIFE REV. 28, 28-48 (1994) (reviewing DAVID GARROW, LIBERTY & SEXUALITY: THE RIGHTS OF PRIVACY AND THE MAKING OF *ROE V. WADE* (1994)).

428. *Mitchell*, 400 U.S. at 264 n.37.

a redress of grievances.

Given the substantive terms of RFRA, the important question for present purposes is what Congress *can* do under the language of the First Amendment. Given the express protection afforded by the negative on federal power, one could certainly conclude that laws which protect and encourage free exercise, speech, press, peaceable assembly and petition for redress of grievances would be permitted.[429] Laws or policies "respecting an establishment of religion," by contrast, are forbidden.[430]

Setting aside, for present purposes, the intriguing question of whether Congress could have written the *Lemon*[431] test (which would certainly be a law "respecting" what the courts view as "establishments of religion"), we are faced with the primary problem glossed over in the Court's incorporation project: the relationship of the Court's First Amendment jurisprudence to the language of the First Amendment itself.

The case law does not begin its analysis from the text of the First Amendment, rather it begins with the Court's decisions incorporating the Amendment. Because the First Amendment does not literally apply to the states, the task the Court has undertaken for itself has been to interpret the language of the Fourteenth Amendment in a manner that captures the essence of the First. The result has been confusion.[432] The content of the incorporated norms is not clearly understood, their relationships to each other and with those of the Fourteenth Amendment have not been explored to any great degree.[433] Also, the structural or power relationships among Congress, the states and the Court have, until *Smith,* largely been ignored.[434]

As applied to religious liberty, the structural issue is *whose* vision of religious liberty and equality of citizens and persons controls: that of the states, the Congress, or the

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429. *See, e.g.*, Paulsen, *supra* note 338.

430. An extended discussion of the meaning of the key phrase "an establishment of religion" is beyond the scope of this Article. It should be noted, however, that the Court has never defined the term "an establishment of religion," but rather appears to equate the term "religion" with the more limited phrase "an establishment of religion." That this causes a number of conceptual difficulties, including the development of a de facto "two-tiered" definition of religion, is directly relevant to the definition of the non-establishment norm.

431. Lemon v. Kurtzman, 403 U.S. 602 (1971).

432. The specific guidelines which have resulted from the process have been so confusing and contradictory that virtually no one is satisfied with them. In *Murray v. City of Austin*, for example, Judge Myron Goldberg of the United States Court of Appeals for the Fifth Circuit observed in dissent that "[a]nyone reading Establishment Clause precedent—the cases on non-purposeful symbolic government support for religion—cannot help but be struck by the confusion that reigns in this area." 947 F.2d 147, 163 (5th Cir. 1991).

433. My prior Article on the structural aspects of religious liberty argues that the confusion and disarray is a logical outgrowth of not only the "peculiar logistics" of the selective incorporation doctrine itself, but also the unthinking manner in which the religious liberty norms have been incorporated. *See* Destro, *supra* note 14.

434. Occasionally, however, a case does arise where these issues are clearly involved. Yet, they are rarely analyzed fully. *Compare* Garnett v. Renton School Dist., 772 F. Supp. 531 (W.D. Wash. 1991) (Equal Access Act does not preempt state constitutional provisions which are said "stricter" than the Establishment Clause) *with* Hoppock v. Twin Falls School Dist., 772 F. Supp. 1160 (D. Idaho 1991) (Equal Access Act has preemptive effect).

Court? A structural analysis of this issue would proceed as follows.[435]

1. Does the Text of the Constitution Expressly Reserve for the States Legislative Jurisdiction over Matters "Respecting" Religion and Religious Establishments?—Yes. Under the terms of the Constitution and Bill of Rights, all power to legislate with respect to religious liberty (save that limited by the Test Clause[436]) is reserved to the states or to the people by the First, Ninth, and Tenth Amendments.[437] Congress arguably has only the power to legislate in a manner consistent with the First Amendment in areas that are otherwise subject to its legislative jurisdiction.[438] Thus, under the First, Ninth and Tenth Amendments standing alone, i.e., without regard to the Fourteenth Amendment, the general presumption of constitutionality rests with the states unless the Constitution grants Congress some other power which must be considered before drawing a conclusion.[439]

As applied to RFRA, the question at this point is twofold:

> 1) Does Congress have the power to impose the substantive requirements of RFRA on the operations of federal government, the District of Columbia or territories whose governments are otherwise subject to federal jurisdiction?[440]
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> 2) Does Congress have the power to impose the substantive requirements of RFRA on the states?

Unless the Court is prepared to hold that the substantive provisions of RFRA, those

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435. *See supra* notes 396-408 and accompanying text for a general discussion of the sort of structural analysis applicable to cases involving the Bill of Rights and the Fourteenth Amendment.

436. *See* Destro, *supra* note 14, at 366-70.

437. Professor Amar's discussion of the federalism components of the First Amendment is very useful here. *See* Amar, *supra* note 165, at 1275-84.

438. The First Amendment forbids laws which *prohibit* the free exercise of religion. To the extent that Congress deems it necessary, proper, and conducive to the general welfare, it may legislate to *protect* religious liberty. *Accord* Amar, *supra* note 165, at 1273-75. *But cf.* William Cohen, *Congressional Power to Interpret Due Process and Equal Protection,* 27 STAN. L. REV. 603, 614 (1975) (arguing that the appropriate distinction is one "that distinguishes between congressional competence to make 'liberty' and 'federalism' judgments . . . ."). Under this theory the focus is on the individual right involved, and if congressional action would limit that right, the congressional judgment "is entitled to no more [judicial] deference than the identical decision of a state legislature." Judgments which could be made at either the state or the federal level would, in Professor Cohen's view, present no problem. How Professor Cohen's suggestion differs from Justice Brennan's "ratchet theory" is not clear.

439. The Court's recent decision in U. S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995), supports this proposition. The federal government *never* had authority over religious establishments, nor did the framers ever claim that it could use any of its powers to create or administer one. The latter is a point recognized by Alexander Hamilton's argument in *The Federalist Papers No.* 69 which stated that the President "has no particle of spiritual jurisdiction." THE FEDERALIST No. 69, at 422 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

440. There is little question that it does. *See generally* Goldman v. Weinberger, 475 U.S. 503 (1986); 10 U.S.C. § 774 (1994) (restricting the scope of command discretion to forbid the wearing of religious symbols by military personnel); UNITED STATES DEP'T OF DEFENSE, JOINT SERVICE STUDY ON RELIGIOUS MATTERS: *REPORT OF THE JOINT STUDY GROUP ON RELIGIOUS PRACTICE* (March 1985). *See also* Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985) (rejecting a challenge to the congressional practice of authorizing military chaplains).

which define the concept of "burden" and reallocate the burden of proof, violate the Establishment Clause because they represent legislative accommodations that impermissibly advance or endorse religion,[441] the first of these questions can be answered in the affirmative. As long as congressional action does not amount to a law "respecting an establishment of religion," it is for Congress to define how solicitous of religious freedom the executive branch shall be as it goes about the task of seeing that the laws "be faithfully executed."

The answer to the second question, the one actually at issue in both *Flores v. City of Boerne*[442] and *Belgard v. Hawaii*, [443] cannot be answered without reference to considerations of federalism. We must therefore ask the following question.

2. Does the Constitution, Read Without Regard to the Fourteenth Amendment, Grant Congress Power to Legislate with Respect to Establishments of Religion and the Permissible Scope of Free Exercise by Individuals and Groups, thus Requiring that the Express Powers of Congress be Read Together with the Reserved Powers of the States in Order to Define the Appropriate Spheres of Federal and State Power?—The answer to this question is "no." The First Amendment was deemed necessary to assure the states that the enumerated powers of the federal government would not be construed to interfere with either state religious establishments or the freedom (or lack thereof) of individuals to exercise their respective faiths in the states in which they resided. The Test Clause of Article VI underscores the point: religious discrimination with respect to offices or public trusts "under the United States" was forbidden, even if the appointing authority was a state.[444]

At this point in the jurisdictional analysis, allocation of power between the federal and state governments with respect to religious liberty is the same as that described by Justice Harlan in *Oregon v. Mitchell*: "No one asserts that the power [at issue] was taken from the States or subjected to federal control by any Amendment before the Fourteenth."[445] Thus, if either Congress or the Court is to have any power at all with respect to non-establishment and free exercise issues in the states, we must also ask:

3. Does the Amended Constitution Contain Other, More Generalized, Authorizing or Prohibiting Norms Which Might Fairly be Construed to Limit Either the Power of the States, or that of the Federal Government, with Respect to "Establishments of Religion" and Laws "Prohibiting the Free Exercise Thereof"?—Section One of the Fourteenth Amendment contains the key prohibiting norms governing the federal rights of individuals as against their respective states. The Citizenship, Privileges and Immunities, Due Process

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441. One author has wrongly argued this writer believes that RFRA may violate the Establishment Clause. Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1098 n.415 (1993). On the contrary, I argued that should Congress be viewed as going too far to accommodate religion, RFRA would be attacked on Establishment Clause grounds. *See Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 65, 308-09 (1992) (statement of Professor Robert A. Destro).

442. 877 F. Supp. 355 (W.D. Tex. 1995).

443. 883 F. Supp. 510 (D. Haw. 1995).

444. *See* Destro, *supra* note 14, at 366-370.

445. 400 U.S. 112, 201 (1970).

and Equal Protection Clauses bind the states to certain minimum behavioral standards, and Section Five empowers Congress to enforce them by legislation. Incorporation of the Religion Clause via the Fourteenth Amendment thus answers this question in the affirmative and changes the balance of power between the states and the federal government with respect to religious liberty issues. It does *not,* however, remove the jurisdictional bar of the First Amendment in its entirety. The powers of the federal government remain limited.

At the very least, the express language of Section One presumes the existence of federal power to preempt state laws or policies that have the purpose or effect of denying equal protection to any person on religious grounds[446] or limiting the privileges and immunities of citizens of the United States on the basis of religion or religious exercise.[447] As interpreted by the Court, Section One also authorizes federal intervention to assure that the states do not inhibit personal religious liberty under the substantive components of the Due Process Clause.

To make these points, however, is merely to restate the key provisions of Section One of the Fourteenth Amendment. Unless we are to ignore the impact of those provisions on the rights incorporated (or, in Professor Amar's words, to continue to "read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what [we] see"[448]), we must begin with the Fourteenth Amendment, not the First Amendment, if we are to make structural sense of the religious liberty guarantee.

4. Given that the Religion Clause has now been "Incorporated" by Judicial Decree, to what Extent Should the Fourteenth Amendment be Interpreted to Authorize Preemptive Federal Policy-Making, Either by Congress or the Court, with Respect to Religious Liberty?—A structural approach to the Court's assertion of federal jurisdiction over the balance to be struck among religiously based interests and the balance between religiously based and secular interests clearly leaves a number of very important questions unanswered. Among these are:

> 1) Is it possible to define, with any degree of clarity, both the mechanism for incorporation by the Fourteenth Amendment and its impact on the religious liberty rights incorporated?
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> 2) Is Congress or the Court empowered by the Fourteenth Amendment to preempt or revise state laws "respecting an establishment of religion or

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446. The Court has never treated religion as either a "suspect" or quasi-suspect classification.

447. Though a full development of the point is beyond the scope of this Article, it is arguable that, with respect to religion-based criteria for participation in federally-funded but State-administered programs, the Privileges and Immunities Clause of the Fourteenth Amendment operates in much the same manner as the Test Clause of Article VI: an individual's religion or religious practice may not be an eligibility factor. *But cf.* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (freedom of speech; content-based regulations); Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993) (equal protection; Education of Handicapped Act); Board of Educ. v. Mergens, 496 U.S. 226 (1990) (freedom of speech; Equal Access Act).

448. *See* Amar, *supra* note 165, at 1136-37.

prohibiting the free exercise thereof,"[449] notwithstanding the unequivocal language of the First Amendment denying any federal jurisdiction over the subject matter?

3) Do the substantive limitations imposed on Congress by the Test Clause, the First and Fourteenth Amendments, and the equal protection component of the Due Process Clause of the Fifth Amendment apply with equal vigor to exercises of the "judicial power of the United States?"[450]

These are the questions glossed over in the Court's First Amendment jurisprudence, and since the Court shows little inclination to deal with them, we must ask the question directly.

D. What is the Role of the Court in Protecting Religious Liberty?

1. Evaluating Claims of Special Competence and Limited Judicial Supremacy.—The questions raised above are inextricably bound up with the more fundamental one: the legitimacy of the Court's claim to be the ultimate arbiter of the Constitution's meaning. The purpose of this section is to examine briefly the proposition that the Supreme Court is uniquely suited to and charged with the important task of defining and protecting individual liberties.

This is one of those fundamental assumptions learned in law school that "appear[s] so obvious that people do not know what they are assuming because no other way of putting things has ever occurred to them."[451] Nevertheless, it bears careful examination here. Whether it is viewed as a matter of political theory or constitutional doctrine,[452] the proposition is an interesting one. At bottom, it is a theory concerning the distribution of political power (jurisdiction) over an immense range of individual, associational and societal interests.[453]

The Court's assumption of political jurisdiction over matters of religion and religious liberty[454] raises significant questions because the language, history and structure of the Constitution reflect the historic distrust of the framers for national decision-making concerning religion. This is not to say that the Court has no role. In fact, precisely the

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449. U.S. CONST. amend. I.

450. *Id.* art. III.

451. Roger C. Crampton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 247-48 (1978) (internal quotation marks omitted). Though Dean Crampton was speaking of the unarticulated value systems which influence American legal education, the criticism is equally applicable to cases involving religious liberty as well as to the coverage and content of chapters (or parts thereof) covering religious liberty in recent law school textbooks.

452. *See, e.g.*, Bradley, *supra* note 51.

453. The breadth of this assertion of power can be illustrated by reference to Justice Harlan's dissent in Poe v. Ullman, 367 U.S. 497 (1961). *See infra* notes 463-67and accompanying text for a discussion of this assertion.

454. Professor Ira Lupu has been explicit on this point. He has argued that *only* the judiciary should have jurisdiction over such claims. *See generally* Lupu, *supra* note 12.

opposite is true. The Court's role is ordained by the Constitution itself.[455]

The challenge here is to answer a more limited question: How does the power of judicial review relate to what Locke described as the task of "distinguish[ing] exactly the business of civil government from that of religion and settl[ing] the just bounds that lie between the one and the other"?[456] Developing an answer requires consideration of an even more basic question: whether or not the Constitution can fairly be read as directly attempting to settle that dispute? I submit it does not, despite recent assertions of some commentators to the contrary.[457]

The Court has no greater competence and, in fact, less legitimacy than Congress does to embark upon such a project. Moreover, it is doubtful that the framers of either the First or the Fourteenth Amendments would have entrusted the Court with such a power, even if the Court had demonstrated a unique competence when deciding other questions which go to the heart of the concept of citizenship.[458] (A task at which it has failed miserably.)

The text and structure of our constitutional system, as well as its history, suggest that the goal of the Constitution was more modest: it was to assure that federal policy respecting both religion and state policy on the subject would be characterized by nondiscrimination and accommodation.[459] Because judicial review is but one means selected by the framers to assure the respect and vitality of the Constitution, the Court's

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455. U.S. CONST. art. III; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("[I]t is emphatically the province and duty of the judicial department to say what the law is.").

456. *See* Locke, *supra* note 70.

457. *See, e.g.*, Sullivan, *supra* note 156. Professor Sullivan argues that "the affirmative implications of the Establishment Clause . . . entail the establishment of a civil order—the culture of liberal democracy." This, in her view, is the "religious truce" which inheres in the Establishment Clause. That such a truce "may well function as a belief system with a substantive content, rather than a neutral and transcendent arbiter among other belief systems" is freely admitted. What is surprising (and refreshing) about the argument is both its candor and its apparent determination to ignore the history, language, and structure of the Constitution in an attempt to demonstrate that "the culture of liberal democracy" is ordained, albeit "implicitly," *by the First Amendment itself as* "the overarching belief system for politics, if not for knowledge." *Id.* at 198-201.

458. *See* THE FEDERALIST Nos. 78-81 (Alexander Hamilton, James Madison, & John Jay) (Clinton Rossiter ed., 1961) (as to the limits on the judicial power of the United States). Some of the Anti-Federalists were even more specific: they wanted specific guarantees directed at the Congress, the executive branch and the federal judiciary. *See* Amar, *supra* note 197. It should also be remembered that "*Dred Scott* [*v. Sandford*, 60 U.S. (19 How.) 393 (1856)] had been so bitterly etched into abolitionist memory that Senator Sumner even sought to bar the customary memorial, placement of Chief Justice Taney's bust in the Supreme Court Chamber, and insisted that his name should be 'hooted down in the pages of history.'" BERGER, *supra* note 190, at 222 n.5. Berger also notes that, "[n]ot long after congressional approval of the [Fourteenth] Amendment, Samuel L. Warner, a Connecticut Republican, said he had 'learned to place but little reliance upon the dogmas of [the] Court upon any question touching the rights of humanity.'" *Id.* at 223 n.9 (quoting VI CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION 1864-1878 (1971)). It was that holding which was resoundingly rejected by both the Reconstruction Congress, and the Citizenship Clause of Section One.

459. It should be noted at this point that I do not by this comment intend to become entangled in the debate between Professors Michael McConnell and Gerard Bradley concerning the historical basis for the accommodation claim. *Compare* McConnell, *supra* note 51 *with* Bradley, *supra* note 51. *See also* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 39 (1992).

role must be equally modest. Properly understood, it is.

History suggests that when the Court is true to its role—when it faithfully and actively[460] mandates respect for the jurisdictional and prohibiting norms derived from the text and structure of the Constitution and its amendments—there is strong protection for individual rights, including those of a statutory character, such as the rights of workers and the statutory right to sue for violation of constitutional rights.[461] This is true because the American people *themselves* have viewed the protection of such interests as necessary, but not sufficient, conditions for the attainment of justice and the common good.[462]

It is only when the Court does not maintain the boundaries between the power of government, the rights of the individual set forth by the Constitution, and laws of the United States, that civil liberties will suffer. They will suffer most when the Court does not respect the limits on its own power.[463] Jurisdiction, the structural limit on the power of the judicial department is, technically, what *Marbury v. Madison* was all about.

The Court's role is an indirect one: it protects civil liberties, including First Amendment rights by even-handed enforcement of the Constitution and laws of the United States.[464] The larger task of protecting civil liberties and defining their substantive content is thus, under any fair reading of the Constitution, a *shared* responsibility.[465] Given the

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460. *Compare, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (enforcing equal protection guarantee); Brown v. Board of Educ., 347 U.S. 483 (1954); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) *with* Buck v. Bell, 274 U.S. 200 (1927); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); Plessy v. Ferguson, 163 U.S. 537 (1896); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

461. 42 U.S.C. § 1983 (1988 & Supp. V 1993). *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (racial discrimination).

462. To the extent that certain liberties are enshrined in federal or state constitutions, they are, by definition, essential to the attainment of the relevant political community's vision of both justice and the common good.

463. In cases such as Korematsu v. United States, 323 U.S. 214 (1944) (Japanese internment), Lochner v. New York, 198 U.S. 45 (1905) (invalidation of state labor standards), and Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (slavery), careful attention to the limits of the Court's own authority would have been useful. The dissenting opinions of Justices Jackson in *Korematsu*, Holmes in *Lochner*, and Harlan in Plessy v. Ferguson, 163 U.S. 537 (1896), are notable not only because they are correct as a matter of constitutional theory, but because they viewed the Constitution as a constraint on the power of the Court itself. *Compare* Morrison v. Olson, 484 U.S. 1058 (1988) (Scalia, J., dissenting) (Court's assumption of the power to justify a Congressional attempt to transfer a portion of the President's power to control prosecutors by application of a "balancing" rationale exposes targets of "special prosecutors" to risks not shared by other individuals suspected of crime) *with* United States v. North, 859 F.2d 216 (D.C. Cir. 1988) (target of special prosecutor's efforts denied a fair trial because special prosecutor may have used immunized testimony); *compare also* Brown v. Board of Educ., 347 U.S. 483 (1954) ("separate is inherently unequal") *with* Brown v. Board of Educ., 349 U.S. 294 (1955) (Court's reliance on the "all deliberate speed" standard for the pace of desegregation under the mandate of *Brown*).

464. *See* 42 U.S.C. § 1983 (1988 & Supp. V 1993). Hamilton's statement in *The Federalist No. 78*, that the Court has "neither force nor will, but only judgment" is singularly applicable here; for there are only a limited class of cases which rest on the Constitution itself. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

465. U.S. CONST. art. IV, §§ 2, 4; *id.* arts. V, VI; *id.* amends. IX, X, XIII-XV, XIX, XXIII, XXIV, XXVI. *See also* Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 641 (1966). *See generally*

language and structure of the Constitution, assertion of federal judicial supremacy over such matters[466] merits close scrutiny.[467]

2. Judicial Power: The Relationship of a Structural Inquiry to the Working Definition of Religious Liberty.—The final step in elaborating a structural framework in which to analyze the substantive rules which can be derived from the Court's incorporation project is to explore not only the basis for the Court's assertion of an unreviewable power to make national policy concerning religion, but also the relationship of that power claim to the definition of religious liberty which has developed since *Cantwell v. Connecticut*[468] and *Everson v. Board of Education*.[469]

This Article, however, is not the forum in which to conduct that examination. For present purposes, it is sufficient to note that, from a structural perspective, both "selective incorporation" and the sort of "pure" substantive due process analysis heralded in the dissent of Justice Harlan in *Poe v. Ullman*[470] and recently affirmed by a majority of the Court in *Planned Parenthood v. Casey*,[471] are sweeping assertions of discretionary policy-making authority grounded in the Due Process Clause of the Fourteenth Amendment. The asserted power is accurately described as sweeping because the full scope of the liberty guaranteed by the Due Process Clause cannot be found in, or limited by, the precise terms of the specific guarantees provided elsewhere in the Constitution.

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to the Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard for what history teaches are the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No

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Archibald Cox, *The Role of Congress in Constitutional Determination*, 40 U. CIN. L. REV. 199, 253 (1971).

466. *Cf.* Lupu, *supra* note 12.

467. *See* Fisher, *supra* note 255. Such scrutiny does not deny or question either the finality and binding nature of the Court's judgments in any given case, or the legitimacy of its role in general. As applied to the subject matter at issue here—the religious liberty guarantee, and the myriad relationships affected by it—the task is to determine whether the Court's actions are consistent with its limited, albeit critical, role in our system of government. *Cf.* LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 1392-98 (2d ed. 1995) (raising the question, "Is the Supreme Court the Constitution?," and recounting a colloquy during the confirmation hearings of Judge Kennedy (now Supreme Court Justice) on the finality of the Court's holdings).

468. 310 U.S. 296 (1940).

469. 330 U.S. 1 (1947).

470. 367 U.S. 497 (1961). *See supra* note 453 and accompanying text.

471. 112 S. Ct. 2791, 2806 (1992).

formula could serve as a substitute, in this area, for judgment and restraint.[472]

If Justice Harlan and the majority of the current Court are correct concerning the meaning of the concept of "Due Process," their implicit assertion is that the Due Process Clause of the Fourteenth Amendment empowers some branch of the federal government to strike the balance between "respect for the liberty of the individual and the demands of organized society"[473] in virtually every facet of public and private life, including religious liberty. And because an elusive, living concept of liberty presupposes that some institution or person is empowered to ascertain "the balance struck by this country, having regard for what history teaches are the traditions from which it broke,"[474] this is a plausible, but fatally flawed, assertion.

What the Court's analysis ignores, however, is the structural question which Justice Brennan described in *Katzenbach v. Morgan* as "of academic interest only":[475] Why is the Court the only branch empowered to strike such balances?

The text, structure, and history of the Fourteenth Amendment prove that in the course of striking the substantive balances which are reflected in Sections One through Five, this country also struck a structural balance aimed not only at abuses of state authority, but also at abuses of judicial authority; and "the People" did so with a clear understanding of "what history teaches are the traditions from which [the Reconstruction Congress] broke."[476]

To the extent that the liberty protected by the Due Process Clause, as defined by Justice Harlan in *Poe v. Ullman* and reaffirmed in *Casey*, authorizes judicial action in defense of liberty and equality, it also empowers Congress, acting pursuant to Section Five of the Fourteenth Amendment, to enact reasonable legislation designed to assure the same end. There is nothing in the text or structure of the Constitution which requires either Congress or a state legislature to wait for authorization from the Court.

It also seems clear that in cases where Congress or a state legislature believes that the Court has balanced the interests in a manner inconsistent with the constitutional norm, there is nothing in either the text or structure of the Constitution, or in the history of the Fourteenth Amendment, which forbids it to enact prospective remedial legislation reasonably designed to enhance either the liberty or the equal protection of the citizenry. That the Fourteenth Amendment was designed to restore rights taken away by the judiciary simply underscores the point.

To state the separation of powers proposition so baldly exposes the breadth of the Court's assertion in *Casey*. If there is no textual limit to the rights protected by the Due Process Clause, and if Justice Brennan's reading of Section Five in both *Morgan* and *Mitchell* are correct, then there is also no effective limit on Congress' authority to strike whatever balances it deems necessary and proper "between [religious] liberty and the demands of organized society."[477]

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472. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

473. *Id.*

474. *Id.*

475. *See supra* note 327-30 and accompanying text.

476. *Poe*, 367 U.S. at 542.

477. *Id.*

But this is plainly wrong. Congress' powers are limited by the terms of the express and implied grants which define the limits of its legislative power.[478] Not only are they subject to the power of judicial review,[479] they are also subject to the limitations of structural federalism.

E. Locating the Power to Preserve Religious Liberty: RFRA in Context

The inquiry into the structural foundations of religious liberty reveals, in part, that Congress and the states are free to protect religious liberty by legislation. Only the extent of this power is in question.

Going back to the structural basics is useful because it serves as a reminder that the First, Ninth and Tenth Amendments, as well as the Test Clause of Article VI and the Fourteenth Amendment,[480] are express limits on the power of the federal government, including the Court's power, to impose a harsh view of religious liberty on the nation. When the Court is perceived to be in error, a thorough analysis of congressional and state power to provide a meaningful remedy requires a thorough understanding of the separation of powers and the federalism implications of permitting "vital questions affecting the whole people, is to be irrevocably fixed by [its] decisions . . . the instant they are made, in ordinary litigation between parties in personal actions . . . ."[481]

That such a result may yield an even murkier "zone of twilight" between the Court and the Congress than that which exists between the Congress and the President is unsurprising, but the ultimate result should be the same. When the Court takes action in the field of individual rights, including religious liberty, which are deemed to be incompatible with the express or implied limits imposed by the Constitution or the legislative will of Congress, it must "rely upon [its] own constitutional powers minus any constitutional [and state] powers over the matter."[482]

The powers of both Congress and the states in this regard are formidable. Congress and the states share the right and the duty to protect the privileges and immunities of all citizens of the United States, and the liberties of all persons lawfully residing within their respective jurisdictions. If Congress does not act, or acts in a manner which the states deem inconsistent with their internal welfare, the Ninth Amendment assures the states that they can, consistent with the demands of the amended Constitution, provide additional protection. Both have done so when the Court has adopted a restrictive view of religious

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478. United States v. Lopez, 115 S. Ct. 1624 (1995).

479. The appointment of Justices who are described as "conservative" by Presidents Reagan and Bush may have temporarily weakened both the allure and the promise of civil libertarian reliance on the judiciary, but one still risks a charge of political heresy (and I use the term deliberately) by questioning the ultimate wisdom of placing so much reliance on the constitutional vision of Justices. Just as the Court reads history selectively, so too do the advocates of judicial supremacy in the field of individual rights. While times, and the political sensitivity of Justices to issues of individual liberty, may change, the human tendency toward prejudice, abuse of power, and self-deception does not.

480. U.S. CONST. amend. XIV, § 5.

481. Abraham Lincoln, First Inaugural Address, (March 11, 1861), *in* SPEECHES AND LETTERS 165, 171 (Merwin Roe ed. 1943).

482. Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 637-638 (1952) (Jackson, J., concurring).

liberty.

To hold, as the district court does in *Flores v. City of Boerne,* that RFRA is unconstitutional because it is inconsistent with *Smith*, both begs the question and misses the point. *Smith* is the Court's most recent teaching on its substantive due process views concerning the meaning of the Free Exercise Clause. That holding is entitled to deference not only because it resolved the controversy between Smith and Black and the Oregon Employment Division, but also because the Court is empowered to construe the Fourteenth Amendment's meaning in the process of deciding such a case.[483]

Smith, however, does not control the constitutionality of RFRA. If RFRA is unconstitutional, it is because Congress either does not have the authority to require a high standard of care from employees of the federal government (which is clearly wrong), or because it does not have the power to impose its will concerning the accommodation of religious liberty upon a recalcitrant state or local government (e.g., the City of Boerne, Texas or the State of Hawaii). Whether RFRA has any independent substantive content is another question.

The appellate courts considering *Flores v. City of Boerne*[484] and *Belgard v. Hawaii*[485] must decide whether the accommodation of religious practice by federal, state and local governments can be viewed as one of the "privileges and immunities of citizens of the United States," or as one of the rights "incorporated" via the Due Process Clause of the Fourteenth Amendment. Because *Cantwell v. Connecticut* is clear on the second point, the *only* question is whether RFRA is a rational means for attaining that end. It is.

The *Sherbert-Yoder* balancing test, which is the heart of RFRA, was not particularly effective in practice, but it is both a "neutral rule of general applicability," and a familiar place to start. More important, however, is RFRA's design to impose the burden of proving the existence of a "compelling state interest" on the government. To the extent that litigants (and judges) take it seriously and actually litigate the "compelling" nature of the interest, RFRA may actually have the same kind of "teeth" that strict scrutiny does in the Equal Protection context.[486] Given the record of the courts in free exercise cases,[487] however, I remain skeptical.[488] More, not less, legislation is needed.

CONCLUSION

When the United States Supreme Court decided to view religious liberty as a fundamental right[489] it took only the first step on the journey across what the late Professor Robert Cover has described as a "bridge linking a concept of a reality to an imagined alternative."[490] There is now over fifty years of case law which captures on paper the

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483. Plaut v. Spendthrift Farm, 115 S. Ct. 1447 (1995).

484. 877 F. Supp. 355 (W.D. Tex. 1995).

485. 883 F. Supp. 510 (D. Haw. 1995).

486. *See* Paulsen, *supra* note 225.

487. *See supra* notes 18-23 and accompanying text.

488. *See generally* Paulsen, *supra* note 225 (discussing how much of the judicial "gloss" on the Free Exercise Clause RFRA adopts by reference).

489. *See supra* notes 54-65 and accompanying text.

490. Robert M. Cover, *The Supreme Court 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L.

Court's vision of religious liberty. It should not be surprising that the design work on the concept-bridge linking the constitutional concepts of non-establishment, free exercise and no religious testing to the Court's case law *looks* like it was done by a committee. The Court *is* a committee.

The question discussed in this Article is "by what right" the judiciary claims the unreviewable power to regulate religious establishments (of whatever stripe) and the authority to treat the clauses of the First Amendment as mutually exclusive norms having little or no relationship to the citizenship status of the actual people they are designed to protect. Justice Jackson's words to the President in *Youngstown Sheet & Tube v. Sawyer* are equally applicable to the judiciary. I quote them here with editorial additions to make the point:

> Courts can sustain exclusive . . . control in such case[s] only by disabling the Congress [and the states] from acting upon the subject. Presidential [and judicial] claim[s] to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[491]

Structural analysis of such questions is a useful tool indeed, not because it enables us to resolve thorny doctrinal issues concerning the proper scope of liberty and personal autonomy in a pluralistic democracy, but because it highlights the very question which plagued both the Constitutional Convention of 1787 and the Reconstruction Congress which sent the Fourteenth Amendment to the states for ratification. To whom does the Constitution entrust the power to preserve and defend the liberties enshrined in the First and Fourteenth Amendments?

We know for certain that, much to Madison's dismay, the Convention rejected both the congressional negative on state laws and judicial participation in a Council of Revision. We also know for certain that neither Madison,[492] nor the Reconstruction Congress, placed any great trust in the ability of the judiciary to control its own powers. Not surprisingly, their distrust has been richly borne out in practice. Judges who strike "sensible balances" on the merits when the underlying issues are jurisdictional are generally wrong on the merits too.[493]

Because it has never been asserted (nor can it be) that the Court's judgments are exempt from the same limits (and prejudices) as apply to other policymakers exercising authority granted or restrained by the Constitution,[494] it is not only possible, but likely, that the Court will, on occasion, misconstrue the very Constitution it is sworn to uphold.[495] As

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REV. 4 (1983).

491. 343 U.S. 579, 637 (1952).

492. Hobson notes that Madison eventually accepted judicial review of state legislation "as a substitute for the congressional negative," but that "his proposal at the Convention to give the executive and judiciary a joint 'revisionary' power over legislative bills was designed to preclude 'the question of a Judiciary annulment of Legislative *Acts*.'" Charles A. Hobson, *James Madison, The Bill of Rights, and the Problem of the States*, 31 WM. & MARY L. REV. 267, 272 (1990).

493. *See* Destro, Review Essay, *supra* note 427.

494. U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

495. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (Japanese internment); Plessy v.

a repository of an immense and unique public trust, it must be viewed in much the same manner as the framers viewed the Congress: as an instrumentality of the federal government with the power (but not the authority)[496] to usurp the limits of its power vis à vis the states and the political branches, and to utilize that power, on occasion, to inhibit individual rights, including religious liberty.[497]

Ferguson, 163 U.S. 537 (1896); Swift v. Tyson, 41 U.S. (1 Pet.) 1 (1842) (described by Justice Holmes in Black and White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Transfer Co., 276 U.S. 518, 533 (1928), as "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct"). *See also* Warren, *supra* note 1.

496. It is not necessary to conclude that the Court's function in this limited class of cases is "lawmaking" to be able to make this point, but that term does provide a useful analogy. To the extent that the Court's interpretations of the Constitution have the force of law and alter the rights and obligations of parties beyond the immediate case or controversy, judicial decisions are, from a structural perspective, identical in their impact to laws adopted by Congress and regulations promulgated under statutory authority by the legislative branch. *See* INS v. Chadha, 462 U.S. 919 (1983) ("action that had the purpose and effect of altering the legal rights, duties and relations of persons . . . all outside the Legislative Branch" defined as an exercise of legislative power). Nowhere is this problem more clearly articulated than in the context of "retroactivity."

The retroactive application of newly announced judicial rules, or congressional attempts to "restore" former ones, present equally difficult structural questions. A recent example of the manner in which these issues are related structurally in the context of statutory interpretation is Ribando v. United Airlines, Inc., 787 F. Supp. 827 (N.D. Ill. 1992). In *Ribando*, the United States District Court for the Northern District of Illinois discussed retroactive application of the Civil Rights Act of 1991 to claims occurring before its effective date and held that "prospective application of the Act best preserves the separation of powers." In response to the assertion that Congress had "overruled" the Supreme Court's holdings in a series of highly controversial cases, the District Court stated:

> To say that Congress has the power to overrule decisions of the Supreme Court is simply inaccurate. *See* Marbury v. Madison, 5 U.S. 137, 178 (1803) (Congress cannot add to nor detract from the powers of the courts granted in the Constitution). Equally inaccurate is to say that the Supreme Court promulgates law. Rather, the Supreme Court interprets enactments of Congress. *Id.* at 176. To the extent that Congress disagrees with the Court's interpretation, Congress may promulgate new law for interpretation by the Court, but may not "overrule" those decisions. *Id.* at 178-80. Prospective application of the Act best preserves the separation of powers of which Justice Marshall spoke. Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 963 n.6 (D.C. Cir. 1990) (Thomas, J.)

Id. at 833 n.8 (citations altered).

A discussion of the separation of powers questions which arise when Congress attempts to promulgate new law designed to strike a constitutional balance other than the one struck by the Supreme Court in the most recent controlling case is largely beyond the scope of this Article.

497. Hamilton addressed this question in *The Federalist No. 81*:

> The arguments or rather suggestions, upon which this charge is founded are to this effect: "The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the *spirit* of the Constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body . . . ." This, upon examination, will be found to be made up

This is, of course, the basis for Dr. Dean Kelly's claim on behalf of the National Council of Churches that *Smith* worked "a repeal of the Free Exercise Clause." Though I respectfully disagree on that particular point because I believe *Smith* correctly answers the question presented given the state of the case law at the time it was decided, the essential point is well taken. Article VI makes limits on the exercise of the judicial power of the United States every bit as real for the Court as they are for every other official entrusted with governmental authority in our federal system. As a result, the critical questions are what these limitations mean, and how they should apply in and to a Court which is largely free of majoritarian political controls.

To undertake an analysis of the meaning of these limitations remains a daunting task. Ever since the Court began the piecemeal incorporation of the First Amendment in *Cantwell v. Connecticut*, outcomes have been driven by the Court's assumption that individual liberties, including those relating to religious liberty, are distinct and sometimes contradictory, categorical imperatives that must be balanced against the interests (compelling or otherwise) of a faceless state, which is either openly hostile or insensitive, to the rights of the people. Justice William Brennan's statement that the "logical interrelationship between the Establishment and Free Exercise Clauses"[498] is a "paradox central to our scheme of liberty,"[499] reflects that assumption without ever asking why that relationship should be interpreted and characterized as a "paradox" at all.

That is why it is far easier to discuss the structural questions of how these liberties should apply to the judiciary department, and what powers, if any, the states and Congress have to make certain these rights are protected should the federal judiciary be inhospitable to them.

This is why history is so important to the judicial task. If history is to inform the discussion of religious liberty at all (and I think it should), it is the entire historical record including that of the period prior to and after the adoption of the Fourteenth Amendment, which should inform our current understanding of the nature of the federal religious liberty guarantee. Though rarely determinative of any specific question, such inquiries do cast light on the substantive evils against which the Test Clause and the First and Fourteenth Amendments were designed to operate.

This was Judge Noonan's point when he wrote that "[t]he experience that made the law is capturable only through history."[500] Opinion concerning religious liberty in the United States has historically been inextricably bound up with political, cultural, philosophical, and religious assumptions concerning both the proper distribution of power in the federal system, and the important and proper role religion and religious believers

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altogether of false reasoning upon misconceived fact.

In the first place, there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws . . . .

THE FEDERALIST NO. 81, at 482 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

498. Schcol Dist. of Abington Township v. Schempp, 374 U.S. 203, 247 (1963) (Brennan, J., concurring).

499. *Id.* at 230, 231.

500. Noonan, *supra* note 238.

play in society. The jurisprudence of the incorporated First Amendment is no place to make an exception.

If religious liberty is a fundamental right, then fundamental questions about the nature of the process by which that liberty is understood by the Court and transmitted to the people cannot simply be assumed or treated as matters of "academic" interest only.[501] They are political questions of the highest order.

Because the structural assumptions which undergird the post-*Cantwell* history of the First Amendment are not usually examined, most of the questions, criticism, or approbation of the Court's handiwork focuses on policy and history, not jurisdiction. The inevitable effect is to make it impossible to focus clearly upon the role the judiciary department has played (or failed to play) in the struggle to eliminate the evils which prompted the adoption of these guarantees in the first place.

The twin propositions that subject matter jurisdiction is always an open question, and that judicial power should be "checked" by the political process are by no means radical. Such is the nature of judicial review and of representative democracy. If there is a silver lining in the cloud which darkens the understanding of many advocates of religious liberty after *Smith*, it is that the case has served as a catalyst which will, in time, precipitate a systematic reconsideration of the entire *corpus juris* of religious liberty. Careful consideration of the separation of powers and federalism aspects of RFRA is the first step in that process.[502]

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501. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) *aff'g* 705 F.2d. 1526 (11th Cir. 1983) (affirming reversal of Jafree v. Board of School Comm'rs, 554 F. Supp. 1104 (S.D. Ala. 1982)). *See generally* Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U. L. Rev. 146 (1986); Ruti Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 Nw. U. L. Rev. 174 (1986); Symposium, *Religion and the State*, 27 WM. & MARY L. REV. 833 (1986); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983); Nancy H. Fink, *The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values*, 27 CATH. U. L. REV. 207 (1978).

502. On January 26, 1996, the United States Court of Appeals for the Fifth Circuit reversed the district court's decision in Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996), *rev'g* 877 F. Supp. 355 (W.D. Tex. 1995). *Flores* is discussed at length in the text accompanying notes 331 to 335, and is significant because it so clearly rejects the arguments made by a number of writers that RFRA is unconstitutional under the Establishment Clause and the principle of separation of powers. It adopts as its separation of powers holding what is, in essence, the central premise of this Article: "In short, the judiciary's duty is to say what the law is, but that duty is not exclusive." It is shared with Congress and the states to the extent that each sovereign is acting within the scope of its constitutional authority.

PUNITIVE DAMAGES ARE A NECESSARY REMEDY IN BROKER-CUSTOMER SECURITIES ARBITRATION CASES

MARGO E. K. REDER*

INTRODUCTION

The two primary legal doctrines in this Article, punitive damages and securities arbitration, each have produced highly publicized close decisions resulting in inconsistent and contentious litigation. The issues raised by this litigation were joined in the case *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[1] recently decided by the United States Supreme Court. *Mastrobuono's* result has enormous financial implications for securities firms and their customers, as well as other industries which arbitrate their disputes.

Securities firms typically require investors to sign a predispute arbitration agreement (PDAA), drafted by their brokers, as a condition to investing. When a dispute arises, it is settled in accordance with previously elected rules, and usually the arbitrator may grant any remedy or relief deemed just and equitable. (Translation: compensatory damages and attorney's fees are available, as are punitive damages, if warranted.) Punitive damages awarded by arbitrators have become a highly publicized lightning rod of sorts, partly due to their perceived frequency and magnitude. The securities industry charges that when arbitration agreements are governed by the law of a state prohibiting punitive damages, state law should control, despite strong federal policy supporting arbitration of all arbitrable claims. Investors, on the other hand, consider punitive damages in arbitration appropriate since punitive damages would frequently have been an available remedy had the case been litigated in court.

This Article addresses important and recurring questions regarding the availability of punitive damages awards in securities arbitrations and, to a lesser extent, other arbitrations. This controversial issue has spawned a mass of conflicting decisions, by both state and circuit courts, and most recently by the Supreme Court. Primarily, the Court in *Mastrobuono* considered whether arbitrators of securities fraud disputes possess the power, pursuant to the Federal Arbitration Act, to award punitive damages—even when state law prohibits such awards. As a related issue, the Court questioned whether customers who must sign a PDAA to open a brokerage account waive the right to recover punitive damages where the agreement is governed by the law of a state prohibiting the awards. The resolution of these issues depends, in part, on which view of the government's power one adopts. An expansive view of federal powers recognizes the ability of arbitrators to award punitive damages, while a restrictive view upholds state laws and allows awards of only compensatory damages.

This Article contains four main sections. Part I outlines the history and evolution of the Federal Arbitration Act (FAA) and discusses the Act's power relative to state law.

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1. 115 S. Ct. 1212 (1995).

Part II addresses the constitutionality of punitive damages, their use in arbitral forums, and relevant state laws. Part III analyzes the phenomenon of punitive damages in securities arbitrations. Finally, Part IV discusses the inconsistencies which still must be resolved.

I. THE LAW OF ARBITRATION

A. History of Arbitration: The Federal Arbitration Act (FAA)

Arbitration becomes an issue when parties to a transaction or contract include a written provision agreeing to settle any controversy arising therefrom by arbitration. This dispute resolution technique is only one of many alternatives to traditional litigation in a judicial forum. Congress enacted the FAA in 1925 in an effort to encourage the use of arbitration as a means to resolve commercial disputes instead of litigating such matters. The FAA's main objective is "to effect expeditious and economical solution of disputes."[2] The law is designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate,"[3] and thus ensures that such agreements are recognized as "valid, irrevocable, and enforceable."[4] Courts must therefore abide by the parties' agreement and are bound by arbitrators' decisions, barring evidence of misconduct, such as fraud or corruption.[5]

The United States Supreme Court has taken many opportunities to consider arbitration cases, and one of the most recognizable themes is the Court's commitment to support and enforce the FAA. Justice O'Connor's opinion in *Shearson/American Express, Inc. v. McMahon* begins with these words:

> The Federal Arbitration Act . . . provides the starting point for answering the questions raised in this case. The Act was intended to "revers[e] centuries of judicial hostility to arbitration agreements," by "plac[ing] arbitration agreements 'upon the same footing as other contracts.'" The Arbitration Act accomplishes this purpose by providing that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or

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2. 9 U.S.C. §§ 1-16 (1994). *See* Joseph P. Lakatos & Thomas G. Stenson, *Punitive Damages Under the Federal Arbitration Act: Have Arbitrators' Remedial Powers Been Circumscribed by State Law?*, 7 J. LEGAL COMM. 661, 662-64 (1992); Carolyn Grace & Gretchen Van Ness, *A Road Not Taken: Reconsidering Mandatory Arbitration of Securities Disputes*, BOSTON B.J., Jan.-Feb. 1992, at 24, 24 (the FAA was enacted to curb hostility towards arbitration agreements, which courts considered revocable at any time prior to an award being made). *See also* Baker v. Sadick, 208 Cal. Rptr. 676, 682 (1985).

3. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985) (per curiam). *See also* Anthony M. Sabino, *Awarding Punitive Damages in Securities Industry Arbitration: Working for a Just Result*, 27 U. RICH. L. REV. 33, 34-38 (1992). *See generally* Garrity v. Lyle Stuart, Inc., 353 N.E. 2d 793 (N.Y. 1976) (4-3 decision) (majority suspicious of arbitrators' powers and unwilling to acknowledge their professionalism).

4. 9 U.S.C. § 2 (1994). This section is perhaps the cornerstone of the FAA, in that it unequivocally declares such agreements valid ("save upon such grounds as exist at law or in equity for the revocation of any contract"). *Id. See generally* H.R. REP. NO. 96, 68th Cong., 1st Sess. 1-2 (1924) (The report accompanying FAA makes clear that arbitration agreements are to be construed as equals to other contracts.).

5. 9 U.S.C. § 10 (1994). *See* C. Evan Stewart, *Securities Arbitration Appeal: An Oxymoron No Longer?*, 79 KY. L.J. 347 (1990-91).

> in equity for the revocation of any contract." The Act also provides that a court must stay its proceedings if it is satisfied that an issue before it is arbitrable under the agreement . . . and it authorizes a federal district court to issue an order compelling arbitration if there has been a "failure, neglect, or refusal" to comply with the arbitration agreement . . . .[6]

The Court's support for arbitration is further evident in *Dean Witter Reynolds, Inc. v. Byrd*, where the Court wrote that the "preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate . . . ."[7] Attempting to combat the historical suspicion and hostility towards arbitration, the Court in *Scherk v. Alberto - Culver Co.* upheld the arbitration clause to an international contract, declaring that it had the same force and effect as other contracts.[8]

As to the scope of the parties' agreement to arbitrate, the Court in *Mitsubishi Motors Corp. v. Soler Chrysler - Plymouth, Inc.* considered the scope of an arbitration clause concerning complex antitrust issues.[9] Concluding that these claims were arbitrable, the Court required the American company "to honor its bargain."[10] The Court noted that "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."[11] This expansive reading is perhaps most pronounced in *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*[12] Finding the contractual dispute in *Cone* arbitrable as per the parties' agreement, the Court set forth a rule of liberal construction:[13] "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . . The effect . . . is to create a body of federal substantive law of arbitrability . . . [and requires that any questions] be addressed with a healthy regard for the federal policy favoring arbitration."[14] *Cone* established the principle that the FAA created federal substantive law.

This general background is particularly helpful when considering the following cases construing the FAA when there are potentially conflicting state laws. By passing the FAA, a body of federal substantive law was created, yet no federal question jurisdiction was established. Therefore, federal courts have jurisdiction only if diversity of citizenship or another independent basis for federal jurisdiction exists.[15] Recognizing this

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6. 482 U.S. 220, 225-26 (1987) (citations omitted).

7. 470 U.S. at 221.

8. 417 U.S. 506, 510-11 (1974).

9. 473 U.S. 614 (1985). The claims involved the Sherman Act, in which some remedies provisions are punitive in nature. *Id.* at 636-37. *See* 15 U.S.C. §§ 1-6201 (1994).

10. *Mitsubishi,* 473 U.S. at 640.

11. *Id.* at 626.

12. 460 U.S. 1 (1983).

13. *Id.* at 24; *cf.* Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 476 (1989).

14. *Cone*, 460 U.S. at 24. *See generally* Perry v. Thomas, 482 U.S. 483, 490-93 (1987) (holding that due regard must be given to federal policy in applying state law principles to construction of contracts that contain arbitration clauses); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405-06 (1967).

15. *See Cone*, 460 U.S. at 25 n.32. If diversity of citizenship is the basis for federal court jurisdiction, then Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), comes into play.

jurisdictional problem, the Court in *Southland Corp. v. Keating* considered a state law that invalidated certain agreements covered by the FAA.[16] The Court first found that the FAA "rests on the authority of Congress to enact substantive rules under the Commerce Clause."[17] It then flatly concluded that the state franchise law was preempted, pursuant to the Supremacy Clause, where it rendered agreements to arbitrate certain claims unenforceable.[18]

Southland Corp. v. Keating firmly establishes the supremacy of the federal substantive law of arbitrability.[19] Therefore, the FAA's substantive provisions are applicable in state as well as federal court.

The three arbitration cases discussed next focus on this tension between federal and state laws of arbitration. The unsettled nature of arbitration is partly because the "FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[20] Thus, since Congress has not totally displaced state regulation of arbitration, federal courts must attempt to reconcile both sets of laws, and "state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law."[21] In construing state and federal arbitration laws, the Supreme Court in *Bernhardt v. Polygraphic Co.* upheld the application of state law regarding an arbitration provision in a contract, concluding that the agreement was not covered by the federal arbitration law.[22] A state law again was challenged by application of the FAA in *Perry v. Thomas*.[23] The Supreme Court concluded that the state law, which required that "litigants be provided a judicial forum for resolving wage disputes," was preempted.[24] It reasoned that the clear federal policy favoring arbitration supersedes the conflicting state-created right.[25]

The most important case construing state law in light of the FAA mandate is *Volt Information Sciences, Inc. v. Board of Trustees*.[26] Volt, when a dispute developed, made a formal demand for arbitration, as per the parties' agreement under section 4 of the FAA.[27] In state court, the Board of Trustees of Leland Stanford Junior University

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16. 465 U.S. 1 (1984).

17. *Id.* at 11. The state law was invalidated pursuant to the Supremacy Clause. *Id.* at 16.

18. *Id.* at 10.

19. *Id.* at 11. *But see id.* at 25-28 (O' Connor, J., dissenting) (legislative history conclusively establishes the FAA as procedural) *and id.* at 17-19 (Stevens, J., concurring in part and dissenting in part) (questioning whether Congress intended to entirely "displace state authority").

20. Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 477 (1989).

21. *Id.*

22. 350 U.S. 198 (1956).

23. 482 U.S. 483 (1987).

24. *Id.* at 490-91.

25. Again, as in *Keating*, Justices Stevens and O'Connor wrote separately regarding their skepticism of the majority's reading of the FAA. *Id.* at 493 (Stevens, J., dissenting) (The Supreme Court "has effectively rewritten [the FAA] to give it a pre-emptive scope that Congress certainly did not intend."); *id.* at 494 (O'Connor, J., dissenting) (state powers to except certain disputes from arbitration should be respected unless Congress decides otherwise.).

26. 489 U.S. 468 (1989).

27. *Id.* at 470.

successfully moved to stay arbitration under authority of state law which allows a stay if "there is a possibility of conflicting rulings on a common issue of law or fact."[28] The appeals court affirmed the stay of arbitration,[29] as did the Supreme Court.[30] Chief Justice Rehnquist wrote that the stay of arbitration, in accordance with the parties' agreement, did not undermine the goals and policies of the FAA.[31] Reasoning that since the parties were completely free to structure their agreement, whereby they agreed to abide by the state rules, "enforcing those rules . . . is fully consistent with the goals of the FAA, *even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.*"[32]

The Court cautioned that the FAA does not confer a right to compel arbitration of any dispute at any time, but rather it confers the right to seek an order compelling arbitration "in the manner provided for in [the parties'] agreement."[33] Finding no actual conflict with federal law, the Court upheld a choice of law clause even though it displaced *procedural* provisions of the FAA.[34] The Court noted however, that the FAA's substantive provisions are applicable in state and federal courts as provided by *Southland Corp. v. Keating*.[35]

Volt is quite important to the outcome of *Mastrobuono,* where the applicable state law bars punitive damages, yet federal law endorses such awards. How strictly choice of law clauses are to be construed becomes a central issue. If courts, following *Volt*, find that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the FAA will preempt such state law.[36] Short of this threshold, state law will be enforced in conjunction with the FAA.[37] Also, to the extent that the power to award punitive damages is viewed as a substantive rather than a procedural issue, the FAA under the Supremacy and Commerce Clauses preempts conflicting state law.

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28. *Id.* at 471. *See* CAL. CIV. PROC. CODE § 1281.2(c) (West 1982 & Supp. 1995).

29. *Volt*, 489 U.S. at 471.

30. *Id.* at 479. *See generally* Sabino, *supra* note 3, at 57-60, 62; Constantine N. Katsoris, *Punitive Damages in Securities Arbitration: The Tower of Babel Revisited,* 18 FORDHAM URB. L.J. 573, 587-88 (1991).

31. *Volt*, 489 U.S. at 477-78; *cf.* Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-25 (1983).

32. *Volt*, 489 U.S. at 479 (emphasis added).

33. *Id.* at 474-75; *cf.* 9 U.S.C. § 4 (1994).

34. *Volt,* 489 U.S. at 476-79. *See also* Jon R. Schumacher, Note, *The Reach of the Federal Arbitration Act: Implications on State Procedural Law*, 70 N.D. L. REV. 459, 474-76 (1994).

35. *Volt*, 489 U.S. at 477 n.6; *see also* Southland Corp. v. Keating, 465 U.S. 1, 12, 16 n.10, 29 (1984) (O'Connor, J., dissenting).

36. *Volt*, 489 U.S. at 477 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

37. *Id.; cf.* Donald O. Mayer & Ellwood F. Oakley III, *Federalism and the Arbitration of Employment Discrimination Claims,* 26 BUS. L. REV. 39 (1993).

B. Arbitration as it has Developed in Resolution of Securities Disputes[38]

As discussed previously, arbitration has developed over the past seventy years to the point where it is a favored dispute resolution technique. While more clarity is necessary to determine how state arbitration laws interact with the FAA, courts rigorously enforce agreements to arbitrate. The seminal case construing agreements to arbitrate securities disputes is *Shearson/American Express, Inc. v. McMahon.*[39] The customers in *McMahon*, alleging that their broker had violated securities laws, filed suit in federal district court.[40] The defendants moved to compel arbitration pursuant to the PDAA signed by the parties.[41] Notwithstanding the Securities Exchange Act of 1934's provision, which grants jurisdiction for resolving disputes to federal courts,[42] the Supreme Court upheld the PDAA, and the claim was arbitrated as per the FAA.[43] The Court compelled enforcement of the PDAA, concluding that there was "sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights."[44] Hailed by the securities industry as an economical way to resolve disputes, this decision dramatically altered the arbitration environment.[45]

Just two Terms later, the Court decided *Rodriguez de Quijas v. Shearson/American Express, Inc.*[46] The Court considered a dispute arising under the Securities Act of 1933,[47] a companion statute to the one involved in *McMahon.*[48] Overruling the long-standing precedent of *Wilko v. Swan*,[49] the *Rodriguez de Quijas* Court upheld the PDAA and mandated arbitration of the Securities Act claims.[50] The Court reasoned that it needed to harmonize the result with *McMahon*, and that "arbitration . . . does not inherently undermine any . . . substantive rights."[51]

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38. This subpart addresses arbitration of securities disputes. It includes discussions of cases, how a claim arises, and the impact arbitration has had in securities disputes, as well as its current status.

39. 482 U.S. 220 (1987). *See* Margo E. K. Reder, *Securities Law and Arbitration: The Enforceability of Predispute Arbitration Clauses in Broker-Customer Agreements,* 1990 COLUM. BUS. L. REV. 91-117.

40. *McMahon*, 482 U.S. at 223.

41. *Id.*

42. Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa (1994).

43. *McMahon*, 482 U.S. at 238. Furthermore, the Court compelled arbitration of RICO claims. RICO is a statute in which some of the remedies are punitive in nature. *Id.* at 242. *See* 18 U.S.C. § 1964(c) (1994).

44. *McMahon*, 482 U.S. at 242.

45. *See* Quinton F. Seamons, *Punitive Damages in Securities Arbitration: Jokers, Deuces, and One-Eyed Jacks are Wild!*, 21 SEC. REG. L.J. 387, 389-92 (1994).

46. 490 U.S. 477 (1989).

47. 15 U.S.C. §§ 77a-77bbbb (1994).

48. *Rodriguez de Quijas*, 490 U.S. at 478-79.

49. 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

50. *Rodriguez de Quijas*, 490 U.S. at 484-86.

51. *Id. See also* Securities Indus. Ass'n v. Connolly, 883 F.2d 1114 (1st Cir. 1989), *cert. denied,* 495 U.S. 956 (1990); *see generally* Gerald A. Madek, *State Regulation of Broker-Customer Pre-dispute Arbitration Agreements,* 20 N.C. CENT. L.J. 27 (1992); Janet E. Kerr, *The Arbitration of Securities Laws Disputes After* Rodriquez *and the Impact on Investor Protection,* 73 MARQ. L. REV. 217 (1989).

Unlike customers, who have historically preferred jury trials, the securities industry has encouraged arbitration because "it avoid[s] the risk of jury trials and 'runaway' awards" by sympathetic juries.[52] As a direct result of the *McMahon* mandate, arbitration claims have risen from less than 3,000 cases before 1987, to approximately 7,000 cases in 1993.[53]

Currently, it is virtually impossible to enter into a broker-customer relationship without signing an arbitration agreement that is supplied by the broker. By doing so, the customer typically agrees that all disputes arising from the contract will be settled by arbitration in accordance with a certain set of rules.[54] Many agreements contain a second feature, a choice of law provision, directing that the agreement will be governed by the laws of a certain state.[55] Such a clause is often used even where the two parties have no significant contacts with that state.[56] (Not coincidentally, the typical PDAA selects New York law because this jurisdiction prohibits arbitrators from awarding punitive damages in contract cases.[57])

The requirements in the PDAAs are clear: arbitration is mandated and is a pre-condition to any judicial review of the dispute. Because arbitration agreements are valid and enforceable,[58] the FAA directs courts to stay proceedings on arbitrable issues, and alternatively, to order arbitration on such issues if there is a reluctant party.[59] Arbitrators are empowered to perform many functions similar to a judicial tribunal, and in fact their power is nearly plenary.[60] Only under very limited circumstances will a challenge to an arbitrator's award succeed.[61]

Securities arbitration is "mostly handled by the . . . 10 separate self-regulatory

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52. Seamons, *supra* note 45, at 390. *See* Mark Weibel, *Federal Securities Arbitration: Does it Provide Adequate Relief?*, ARB. J., Mar. 1993, at 54, 57.

53. Daniel McGinn, *Can't Get No Satisfaction*, NEWSWEEK, Aug. 29, 1994, at 41; Richard Karp, *Wall Street's New Nightmare*, BARRON'S, Feb. 21, 1994, at 15.

54. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713, 715 (7th Cir. 1994), *rev'd*, 115 S. Ct. 1212 (1995); Raytheon Co. v. Automated Business Sys., Inc., 882 F.2d 6, 7 (1st Cir. 1989); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1386 (11th Cir. 1988).

55. *See, e.g.*, *Mastrobuono*, 20 F.3d at 715 (New York law governs); Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976) (New York law governs); *cf.* Lee v. Chica, 983 F.2d 883, 884 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 287 (1993) (Minnesota law governs); *Raytheon*, 882 F.2d at 7 (California law governs).

56. *See Mastrobuono*, 20 F.3d at 715. The plaintiffs were Illinois residents and the broker solicited and serviced their account form Shearson's Houston, Texas office. *Id.*

57. *See Garrity*, 353 N.E.2d at 793. This decision has been repeatedly reaffirmed. *See, e.g.*, Barbier v. Shearson Lehman Hutton, Inc., 948 F.2d 117 (2nd Cir. 1991); Stratton Oakmont, Inc. v. Nicholson, 868 F. Supp. 486 (E.D. N.Y. 1994); Karp, *supra* note 53, at 15-16 (brokerage industry "hoped to export New York's non-punitive damages ruling throughout the U.S."). *See generally* N.Y. ST. L. DIGEST, March 1995 (No. 423), at 1 (New York is favored state among national brokerage houses as industry finds its industry laws "congenial.").

58. 9 U.S.C. § 2 (1994); *cf.* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 338 U.S. 395, 404 n.12 (1967) (arbitration agreements are "as enforceable as other contracts, but not more so").

59. 9 U.S.C. §§ 3, 4 (1994); *cf.* Southland Corp. v. Keating, 465 U.S. 1, 16, 29 (1984).

60. 9 U.S.C. §§ 7, 9, 10 (1994).

61. *Id.* § 10.

organizations" (SROs) of the brokerage business.[62] The NASD, which is the SRO for the Nasdaq market, has an arbitration department, as does the New York Stock Exchange, and so forth. A non-securities group, the American Arbitration Association (AAA) also resolves securities disputes.[63] All SROs are regulated by the Securities and Exchange Commission.

The first feature contained in any PDAA is the set of rules by which disputes are settled. The rules vary slightly among the different SROs, which administer roughly 90% of the cases.[64] For example, as to the availability of punitive damages, the NASD allows "arbitrators [to] consider punitive damages as a remedy,"[65] whereas the AAA rule is less explicit, providing that an arbitrator "may grant any remedy or relief which he deems just and equitable." This AAA provision has been recognized by courts as including the power to award punitive damages.[66]

The second feature of PDAAs, not required but often used, is the choice of law provision. This was the paramount issue in *Mastrobuono*, discussed in Part III of this Article. Under this provision, the brokerage firm hopes that by inserting a choice of law clause naming a state that bars punitive damages awards, it will not be liable for such awards, despite arbitration forum rules that may allow this relief.

Just as there has been a sharp rise in claims since arbitration became mandatory, the complexity and cost of claims, and the size of awards have increased.[67] It has become "Wall Street's new nightmare."[68] In 1983, damages requested at NASD arbitrations amounted to $56.9 million. By 1993, the figure had jumped to $499.6 million.[69] Punitive damages, historically perceived as unavailable in securities arbitration, have increasingly been awarded, ranging from $250,000 to $3.5 million in 1992.[70] The specter of punitive damages has received widespread attention, even though fewer than two percent of all securities arbitration awards include them.[71]

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62. Margaret Popper, *Is Arbitration Fair?,* INVESTMENT DEALERS' DIG., Apr. 20, 1992, at 14, 15. Many, of course, take issue with the term "self-regulatory."

63. *See* Karp, *supra* note 53, at 15; *cf.* Popper, *supra*, note 62, at 15 (AAA handles some broker-customer disputes but typically hears employment disputes between brokers and their firms).

64. Popper, *supra* note 62, at 15. As between all arbitration venues, claimants prevail roughly 60% of the time, receiving about 60% of the amount sought. *See also* Karp, *supra* note 53, at 16.

65. Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713, 717 (7th Cir. 1994).

66. American Arbitration Association, Commercial Arbitration Rule 42 (now known as Rule 43), *available in* WESTLAW, AAA-Pubs database, 1993 WL 495832 (A.A.A.). *See* Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1386-87 (11th Cir. 1988).

67. Karp, *supra* note 53, at 15. *See also* Seamons, *supra* note 45, at 389-90.

68. Karp, *supra* note 53, at 15. *See* J. Stratton Shartel, *Securities Arbitration Attorneys Describe Diverse Strategies*, 8 SEC. ARB. 14, 14 (1994), *available in* LEXIS, News Library, CURNWS File.

69. Shartel, *supra* note 68, at 14.

70. Seamons, *supra* note 45, at 387.

71. Former Vice-President Dan Quayle has spoken repeatedly on this topic. The Supreme Court has frequently accepted punitive damages cases. *See infra* Part III. *See generally* Margaret A. Jacobs & Michael Siconolfi, *Losing Battles, Investors Fare Poorly Fighting Wall Street - And May Do Worse*, WALL ST. J., Feb. 8, 1995, at A1; Richard Pérez-Peña, *U.S. Juries Grow Tougher on Those Seeking Damages,* N.Y. TIMES, June 17, 1994, at A1 & B18; 5 SEC. ARB. COMMENTATOR (No. 7) May 1993, *Chart G*, at 10; Franklin D. Ormsten,

II. THE LAW OF PUNITIVE DAMAGES[72]

Punitive, or exemplary, damage awards represent an amount in excess of damages needed to compensate victims. Such awards are predicated on findings that defendants' actions were malicious, willful, reckless, or outrageous.[73] Such damages are assessed as civil fines for flagrant or egregious misconduct and are usually awarded directly to the plaintiffs. The ostensible goals of these awards are punishment and deterrence. The same justifications underlie criminal prosecutions, and thus the perception exists that punitive damages are quasi-criminal in nature, and therefore merit a greater degree of scrutiny than general civil damage awards.[74]

A. Principles Governing the Award of Punitive Damages

The Supreme Court has taken an abiding interest in punitive damages and has considered numerous challenges to these awards based on Eighth Amendment, and most recently, Fourteenth Amendment theories. The result has been a series of decisions which agree that punitive damages are a matter of great concern and merit review to ensure that substantive and procedural due process is met. Nonetheless these decisions lack harmony as to what level of review is required. Under the common law, punitive damages were determined "by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable."[75]

In *Pacific Mutual Life Insurance Co. v. Haslip,* the Court considered, *inter alia,* whether a punitive damages award violated the Due Process Clause.[76] Rejecting the challenge to an award over four times greater than the amount of compensatory damages (and 200 times greater than out-of-pocket expenses), the Court concluded that the state standard of review "imposes a sufficiently definite and meaningful constraint on the discretion" of the jury so as not to offend the Due Process Clause.[77] Even while refusing to "draw a mathematical bright line," the Court developed a general "reasonableness" test and found the review procedure acceptable where the jury was instructed as to the nature and purpose of punitive damages, identified the damages as punishment for civil

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Punitive Damages in Securities Arbitration, N.Y.L.J., Jan. 21, 1993, at 1; George H. Friedman, *Punitive Damages in Securities Cases*, N.Y.L.J., May 2, 1991, at 3.

72. Subpart A of this section discusses principles that the Supreme Court has enunciated with respect to punitive damages awards. Subpart B discusses the availability of punitive damages as a remedy in arbitration.

73. *See generally* Katsoris, *supra* note 30, at 574-76 (citing existence of punitive damages for thousands of years); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 6 (1990); David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 705 (1989).

74. *See generally* Margo E. K. Reder, *Punitive Damages Awards: The Courts' Role, and Limitations of Review*, 27 BUS. L. REV. 59, 59-60 (1994).

75. Pacific Mut. Life Ins., Co. v. Haslip, 499 U.S. 1, 15 (1991); *cf.* Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

76. *Haslip*, 499 U.S. at 15.

77. *Id.* at 22-23. The Court also reviewed on substantive due process grounds, but mainly focused on the procedural aspect of the due process mandate. *Id.*

wrongdoing, and explained that their imposition was not compulsory.[78]

In *TXO Production Corp. v. Alliance Resources Corp.*, the Court heard a challenge to a $10 million punitive damages award—526 times greater than the actual damages of $19,000.[79] The Court again rejected the challenge, concluding that the award was not so excessive as to be an arbitrary deprivation of property without due process of law.[80] The Court echoed its ruling in *Haslip,* which relied on a "reasonableness" test, and found that the trial judge's review of the award, while somewhat lacking, was sufficient.[81]

Most recently, in *Honda Motor Co. v. Oberg*, the Court heard a challenge to a $5 million punitive damages award where the compensatory damages were just under $1 million.[82] In Oregon, where the case arose, an amendment to the state constitution prohibited judicial review of the amount of a punitive damages award unless there was no evidence to support it.[83] Finding that Oregon's procedures failed to sufficiently limit juries' discretion in their award of punitive damages, the Court concluded that Oregon's low level of review violated the Fourteenth Amendment's Due Process Clause.[84] The Court dismissed the procedures that the Oregon courts followed, criticizing them as inadequate to assure that there are no arbitrary deprivations of property [85]

From these three recent cases, two principles become clear. First, the Supreme Court has decided that the Constitution, through the Fourteenth Amendment's Due Process Clause, imposes a substantive limit on the size of punitive damages awards.[86] And second, the Due Process Clause has a procedural component mandating a level of judicial review over a jury's decision in order to avoid the danger of an arbitrary deprivation of property.[87] There is, however, a significant difference of opinion among the Justices as to what standard of review is necessary. Most recently, in *Oberg,* Justice Ginsburg, joined by Chief Justice Rehnquist in the diseent, asserted that even though Oregon's procedures were lacking in appellate review, safeguards existed and were adequate to ensure due

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78. *Id.* at 18-24.

79. 113 S. Ct. 2711, 2717-18 (1993).

80. *Id.* The Court apparently agreed with the lower court that the *potential* for harm from such behavior as the defendants engaged in merited such an award in order to discourage similar practices. *See* TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 889 (W.Va. 1992).

81. *See TXO,* 113 S. Ct. at 2723-24.

82. 114 S. Ct. 2331, 2334 (1994).

83. *Id.* at 2338, 2338 n.5. *But see id.* at 2344-46 (Ginsburg, J., dissenting) (Oregon's procedures, requiring clear and convincing evidence of entitlement to punitive damages, "pass the Constitution's due process threshold.")

84. *Id.* at 2340-42.

85. *Id. But see id.* at 2349-50 (Ginsburg, J., dissenting). *See also* Paul M. Barrett, *Supreme Court Rules Punitive Award in Oregon Case Was Unconstitutional,* WALL ST. J., June 27, 1994, at B4; Linda Greenhouse, *Punitive Damage Awards by Juries Must Be Subject to Judicial Review, Justices Rule,* N.Y. TIMES, June 25, 1994, at 11; *cf.* Pérez-Peña, *supra* note 71, at B18.

86. Pacific Mut. Life Ins., Co v. Haslip, 499 U.S. 1, 1 (1991). *See* TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2720-21 (1993). *See generally* Reder, *supra* note 74.

87. *Haslip,* 499 U.S. at 18-23. *Cf. TXO,* 113 S. Ct. at 2718-20 (Court rejected parties' arguments to adopt either a "heightened scrutiny" test or a "rational basis" test for analyzing constitutionality of judicial review procedures).

process.[88] The dissent's approach would radically limit Supreme Court review of punitive damages and leave it to the states as a matter of their discretion.[89] While Justice Scalia concurred in the *TXO* judgment, he also criticized the present procedural due process approach, characterizing it as a "clumsy" way to impose a standard of "reasonable punitive damages."[90]

However it evolves, this reasonableness test is most relevant to the constitutionality of punitive damages awards in arbitration cases. In fact, it should be anticipated, subsequent to *Mastrobuono*, that the next question will be whether the arbitrator's procedure is flawed or whether the punitive damages award is so excessive as to violate the Due Process Clause.

B. Punitive Damages Awards and Arbitration

Under the FAA, courts are required to enforce arbitrators' awards "unless the award is vacated under the rules set forth in section 10."[91] Awards may be vacated only upon evidence of fraud, corruption, bias, material misconduct, abuse of power or other similar findings.[92] In other words, there must have been some manifest disregard of the law. Awards may be modified upon such grounds as clear evidence of a "material mistake," or where "the award is imperfect in matter of form not affecting the merits of the controversy."[93] Clearly, there is presently no evidence of an abiding interest in reviewing arbitrators' decisions.

The award of punitive damages, however, is peculiarly susceptible to review because of the nature of the damages. Further, the availability of such damages has historically been a matter of state law and in general the measure of such damages is controlled by state law. Therefore, in a diversity action where state law provides the basis for the decision, the propriety of an award of punitive damages typically becomes a question of state law.[94] Arbitration agreements today are typically based on commercial transactions governed by contracts. State courts have been less willing to grant punitive damages awards in this context than, for example, suits involving claims for tortious damages.

The most notable case opposing punitive damages in arbitration is *Garrity v. Lyle Stuart, Inc.*[95] The New York State court in *Garrity* considered whether the arbitrator had power to award punitive damages in a contract dispute upon finding that the defendant publisher wrongfully withheld royalties from the plaintiff author.[96] In a 4-3 decision, the court ruled that arbitrators have "no power to award punitive damages, even if agreed

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88. *Oberg*, 114 S.Ct. at 2348-50. (Ginsburg, J., dissenting).

89. *Id.* at 2343-50; *cf.* Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 477-79 (1989).

90. *TXO*, 113 S.Ct. at 2728 (Scalia, J., concurring); *see* Kenneth R. Davis, *Due Process Right to Judicial Review of Arbitral Punitive Damages Awards*, 32 AM. BUS. L.J. 583 (1995).

91. 9 U.S.C. §§ 9, 10 (1994). *See generally* Marta B. Varela, *Arbitration and the Doctrine of Manifest Disregard,* DIS. RES. J., June 1994, at 64.

92. 9 U.S.C. § 10 (1994).

93. *Id.* § 11.

94. *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 278 (1989).

95. 353 N.E.2d 793 (N.Y. 1976).

96. *Id.* at 794.

upon by the parties."[97] Basing its decision on "strong public policy indeed," the court concluded that punitive damages are not available for "mere breach of contract, for in such a case only a private wrong, and not a public right is involved . . . ."[98] The court reasoned that the imposition of punitive sanctions is a social remedy requiring judicial oversight that is beyond the province of private tribunals. Issued in 1976, this opinion at its worst, parallels the history of "judicial hostility to arbitration agreements" that has existed over the centuries.[99]

The *Garrity* rule has been adopted by many courts and jurisdictions.[100] However, the rationale and soundness of the decision is questionable due to the extent that the law of arbitration has matured and the fact that the use of such agreements is so broad and so common at this time. In fact, the *Garrity* dissent pointed out that refusing to allow arbitrators the power to award punitive damages for a contract arbitration on public policy grounds has the effect of favoring "a guileful defendant and voids a just and rational award . . . to a wholly innocent . . . plaintiff. Arbitrators are entitled to 'do justice . . . [and] short of complete irrationality, they may fashion the law to fit the facts before them.'"[101] In short, the *Garrity* jurisdictions greatly undermine the powers the FAA grants to arbitrators. This has a pernicious effect of unduly and needlessly complicating the arbitration process by injecting into it arcane state choice of law issues, which were to be avoided by virtue of signing an agreement to arbitrate, rather than litigate disputes that arise.[102]

The availability of punitive damages in arbitration proceedings has been, and to some extent, will continue to be controversial. This is true where agreements are silent on the availability of such damages and state law is either silent on the subject or expressly disallows them. Federal courts in a diversity proceeding must attempt to reconcile the FAA, which grants arbitrators full power to fashion appropriate remedies, and state laws (due to a choice of law clause in the PDAA) that disallow punitive damages awards in arbitration. Attempting to determine whether punitive damages awards are a matter of substantive or procedural law (whereby punitive damages would be available under the former but not the latter) is a flawed analytical framework. This side-steps the real issue of how much power arbitrators should have to fashion remedies for disputes that would previously have been decided in court. Arbitrators must have powers that are comparable

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97. *Id.*

98. *Id.* at 795.

99. Scherk v. Alberto-Culver, Co., 417 U.S. 506, 510 (1974).

100. *See* Fahnestock & Co. v. Waltman, 953 F.2d 512 (2d Cir. 1991), *cert. denied*, 502 U.S. 1120 (1992); Independent Employees' Union v. Hillshire Farm Co., 826 F.2d 530 (7th Cir. 1987); Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334 (7th Cir. 1984); Shahmirzadi v. Smith Barney, Harris Upham & Co., 636 F. Supp. 49 (D.D.C. 1985); McLeroy v. Waller, 731 S.W.2d 789 (Ark. Ct. App. 1987); United States Fidelity & Guar. v. DeFluiter, 456 N.E.2d 429 (Ind. Ct. App. 1983); Shaw v. Kuhnel & Assoc., Inc., 698 P.2d 880 (N.M. 1985). *See generally* Miller Brewing Co. v. Brewery Workers Local Union, 739 F.2d 1159, 1164 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) (asserting that "arbitrators are rarely thought authorized to award punitive damages").

101. *Garrity*, 353 N.E.2d at 797, 800.

102. *See generally* Sarnoff v. American Home Prods. Corp., 798 F.2d 1075 (7th Cir. 1986); Potomac Leasing Co. v. Chuck's Pub, Inc., 509 N.E.2d 751 (Ill. App. 1987); McAllister v. Smith, 17 Ill. 328 (1856).

to those of a court if arbitration is to be recognized as a legitimate system of dispute resolution.

III. PUNITIVE DAMAGES IN SECURITIES ARBITRATION[103]

Punitive damages awards are not available for claims under the federal securities acts.[104] However, such awards are permissible *in courts* when plaintiffs join pendant state claims with the federal claims where the underlying state law so provides. Of course, the issue here revolves around the power to award punitive damages *in arbitration.*[105] Securities arbitration clauses are required of investors by broker-dealer firms as a condition of doing business. In some cases investors have a choice of arbitration forum in that they may elect arbitration by the independent American Arbitration Association (AAA).[106] More often than not though, investors must elect between different industry sponsored arbitration forums that are ultimately regulated by the Securities and Exchange Commission.[107]

Under AAA rules, arbitrators are empowered to "grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties."[108] Although the AAA rules do not explicitly mention punitive damages, the AAA language is quite broad and has been construed to support an award of punitive damages, providing that it is within the scope of the parties' agreement. Industry sponsored forums differ to an extent. New York Stock Exchange (NYSE) rules, and the Code of Arbitration Procedures of the National Association of Securities Dealers (NASD) are silent on the issue of punitive damages.[109] Notwithstanding the NASD's Code, its Arbitrator's Manual states that arbitrators can consider punitive damages as a remedy.[110]

Therefore, when investors sign a PDAA they may elect an arbitration forum that may or may not specifically allow arbitrators to award punitive damages, but might

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103. Subpart A of this section discusses the lower courts' decisions. Subpart B addresses the Supreme Court's decision in *Mastrobuono.*

104. Section 28(a) of the Securities Exchange Act of 1934 limits recovery to actual damages. *See* 15 U.S.C. § 78bb (1994). Section 17a of the Securities Act of 1933 does not sustain an award of punitive damages. *See* 15 U.S.C. § 77q(a) (1994). *See generally* Carras v. Burns, 516 F.2d 251, 259-60 (4th Cir. 1975); Globus v. Law Research Serv., Inc., 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

105. *Compare* Brief for Petitioners at 25, Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713 (7th Cir. 1994) (No. 94-18) (pursuant to federal law parties may agree to arbitrate punitive claims) *with* Brief for Respondents at 43-44, Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713 (7th Cir. 1994) (No. 94-18) (Congress never deemed it necessary to confer "right" to seek punitive damages and they may not seek them under federal securities laws).

106. U.S. GENERAL ACCOUNTING OFFICE, SECURITIES ARBITRATION: HOW INVESTORS FARE: REPORT TO CONGRESSIONAL REQUESTERS 31-33 (May 1992) [hereinafter GAO REP'T] (noting large firms seldom include AAA as an alternative forum despite SECs encouragement to do so).

107. *Id.* at 5.

108. Raytheon Co. v. Automated Business Systems, Inc., 882 F.2d 6, 9-10 (1st Cir. 1989).

109. *See* J. Alexander Sec., Inc. v. Mendez, 21 Cal. Rptr. 2d 826, 831 (1993), *cert. denied*, 114 S. Ct. 2182 (1994); Respondent's Brief, *supra* note 105.

110. Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713, 717 (7th Cir. 1994).

nevertheless be broad enough in language to empower them to make such awards. Second, investors historically have signed PDAAs containing a New York choice of law clause even when they have no connection there and the transactions occur elsewhere. Recall that under New York law, punitive damages may never be awarded in a contract dispute *even if the parties agreed to them.* It is notable that none of the standard form agreements explains the significance and effect of the New York choice of law clause, which dramatically favors brokers, and not surprisingly, negatively impacts investors.

At this time it is helpful to recap the issues involving challenges to punitive damages in securities arbitrations. There are substantive and procedural aspects to punitive damages, and a patchwork of federal and state rules in this area. Securities disputes, likewise, are governed by state and federal laws. Arbitration is primarily regulated by federal law, yet the agreements often simultaneously contain disparate clauses. They offer punitive damages with one hand through an arbitration forum selection clause, yet take away the awards with the other hand through devices such as a New York choice of law clause.

Do investors waive the right to recover punitive damages by signing a PDAA when it is governed by a *Garrity* type clause? This is among the issues considered by the *Mastrobuono* Court. Prior to this decision a number of courts considered this issue, and reached conflicting results. The Court of Appeals for the Second Circuit[111] as well as the Seventh Circuit Court of Appeals[112] and the District Court for the District of Columbia[113] disallowed awards of punitive damages, reasoning that *Garrity* was controlling despite federal arbitration law. The Courts of Appeals for the First,[114] Fifth,[115] Eighth,[116] Ninth,[117] and Eleventh[118] Circuit Courts (along with district courts in North Carolina[119] and South Dakota[120] and a California state court[121]) upheld awards of punitive damages, reasoning that strong federal policy favoring arbitration took precedence over state laws.

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111. Barbier v. Shearson Lehman Hutton, Inc., 948 F.2d 117 (2d Cir. 1991); Fahnestock & Co. v. Waltman, 953 F.2d 512 (2d Cir. 1991); Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976).

112. *Mastrobuono*, 20 F.3d at 713; *accord* Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334 (7th Cir. 1984); *cf.* Baselski v. Paine, Webber, Jackson & Curtis, Inc., 514 F. Supp. 535 (N.D. Ill. 1981). *But cf.* Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704 (7th Cir., 1994) (upholding punitive damages award of $120,000 based upon compensatory damages of $60,000 for tortious conduct arising under the contract to be arbitrated).

113. Shamirzadi v. Smith Barney, Harris Upham & Co., 636 F. Supp. 49 (D.D.C. 1985).

114. Raytheon Co. v. Automated Business Systems, Inc., 882 F.2d 6 (1st Cir. 1989); *cf.* Escobar v. Shearson Lehman Hutton, Inc., 762 F. Supp. 461 (D. P.R. 1991).

115. Miley v. Oppenheimer & Co., 637 F.2d 318 (5th Cir. 1981).

116. Lee v. Chica, 983 F.2d 883 (8th Cir. 1993).

117. Todd Shipyards Corp. v. Cunard Line, LTD., 943 F.2d 1056 (9th Cir. 1991).

118. Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988); Singer v. E.F. Hutton & Co., 699 F. Supp. 276 (S.D. Fla. 1988). *See generally* Willoughby Roofing and Supply Co. v. Kajima Int'l, Inc., 776 F.2d 269 (11th Cir. 1985), *aff'g* 598 F. Supp. 353 (N.D. Ala. 1984).

119. Willis v. Shearson/American Express, Inc., 569 F. Supp. 821 (M.D.N.C. 1983).

120. Ehrich v. A.G. Edwards & Sons, Inc., 675 F. Supp. 559 (D.S.D. 1987).

121. J. Alexander Sec., Inc. v. Mendez, 21 Cal. Rptr. 2d 826 (1993).

A. The Split Among the Circuit Courts Regarding the Power of Arbitrators to Award Punitive Damages in Securities Arbitrations

1. Decisions Upholding Punitive Damages Awards.—

a. First Circuit: Raytheon Co. v. Automated Business Systems, Inc.[122]—The court in *Raytheon* considered whether commercial arbitrators have the power to award punitive damages pursuant to a general arbitration clause not specifically addressing such damages.[123] The parties' agreement incorporated AAA rules. California was selected under a choice of law clause, but the court disregarded this choice and instead looked to federal common law for guidance.[124] Noting that arbitration was required for *all* disputes arising from the contract, and that AAA Rule 42 (now Rule 43) empowers arbitrators to grant any remedy which is (1) equitable, and (2) within the terms of the parties' agreement, the First Circuit questioned whether a punitive damages award was a remedy the parties agreed to include.[125] The court concluded that arbitrators were authorized to award punitive damages, finding that the contract language, as well as case law, supported a broad interpretation of arbitrators' powers.[126] The court specifically observed that where punitive damages could be awarded in court, the change in forum to an arbitration setting should not result in a change of law and prohibit a party from recovering the same damages.[127]

b. Fifth Circuit: Miley v. Oppenheimer & Co.[128]—This case pre-dates *McMahon* and is included even though its *dicta* is the only support for securities arbitration.[129] In *Miley*, the investor prevailed in her securities fraud suit, and the broker challenged the trial court's refusal to order arbitration of pendant state law securities claims.[130] At the time of the holding, federal securities law claims could not be subjected to arbitration.[131] The Fifth Circuit followed this precedent but noted that "the parties have a right, if they so desire, to have an arbitrator decide whether there was sufficient misconduct . . . ."[132]

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122. 882 F.2d 6 (1st Cir. 1989).

123. *Id.* Damages were awarded in arbitration as follows: Compensatory $408,000; Attorney's Fees $121,000; Expenses $47,000; Punitive $250,000. *Id.* at 7.

124. *Id.* at 7, 11 n.5. *See* John F. X. Peloso & Stuart M. Sarnoff, *Punitive Damages in Arbitration*, N.Y.L.J., Aug. 18, 1994, at 3, 27; Ormsten, *supra* note 71, at 1, 31 (*Raytheon* rejected *Garrity* and narrowly construed *Volt*).

125. *Raytheon*, 882 F.2d at 9-10. *See also* Sabino, *supra* note 3, at 54-57 (questions on scope of power resolved by *Raytheon* court in favor of arbitration).

126. *Raytheon*, 882 F.2d at 10-12 (court reached this result after considering language of agreement including AAA clause as well as intent of parties, and explicitly rejected thesis that arbitrators must have explicit contractual authority to award punitive damages).

127. *Id.* at 10, 12. Justice Breyer was previously a member of the *Raytheon* panel of judges. *Cf.* Escobar v. Shearson Lehman Hutton, Inc., 762 F. Supp. 461 (D. P.R. 1991).

128. 637 F.2d 318 (5th Cir. 1981).

129. *Id.* at 336 n.15. Damages were awarded as follows: Compensatory $54,000; Punitive $100,000. *Id.* at 326, 331.

130. *Id.* at 334-37.

131. *See* Wilko v. Swan, 346 U.S. 427 (1953).

132. *Miley*, 637 F.2d at 336.

c. Eighth Circuit: Lee v. Chica.[133]—Judy Lee, an investor, signed a securities account agreement stating that arbitration would be governed by Minnesota law, which had been construed to prohibit punitive damages, yet "AAA Rule 43 specifically allow[ed for] . . . punitive damages."[134] The court was asked to consider which law to apply.[135] Without formally adopting a preemption approach to the issue, the court declared that, "[a]rbitrability of contracts evidencing interstate commerce is governed by federal substantive law rather than state law."[136] The court cited with approval the decisions of the First, Ninth and Eleventh Circuits, and held that pursuant to AAA rules, "arbitrators may grant any remedy or relief including punitive damages."[137] It specifically distinguished its decision from those following Second Circuit precedent, stating that in *Lee* the state law was unclear and that AAA rules were very broad, whereas in *Garrity* type cases, the state law was clear and broad AAA rules were not incorporated.[138]

Judge Beam dissented in *Lee*, and articulated many concerns that may prove to be a harbinger for future cases. He recognized that AAA rules speak in terms of "remedy or relief" and "compensation," and are silent about punishing the defendant.[139] He advised against expanding the scope of the proceedings beyond the terms *actually* agreed upon and cautioned that punitive damages awards are subject to constitutional constraints such as those enunciated in *Haslip* and its progeny.[140] To comport with such requirements, Judge Beam asserted that it would necessitate a total change in arbitration rules for consideration of punitive damages awards.

d. Ninth Circuit: *Todd Shipyards Corp. v. Cunard Line, LTD.*[141]—Todd filed a demand for arbitration alleging, *inter alia*, breach of contract.[142] The parties' commercial arbitration agreement specified that New York law governed and that AAA rules applied.[143] Rejecting Cunard's contention that *Volt* and New York law governed, the *Todd* court expressed that the "Supreme Court has said time and again that issues of arbitrability in cases subject to the Act [FAA] are governed by federal law."[144] The court agreed with "the expansive view that . . . the power of arbitrators to decide disputes, coupled with the incorporation of AAA . . . Rule 43 . . . provided the arbitration panel here with authority to make the punitive damage award."[145] Like *Lee*, the *Todd* court found it significant,

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133. 983 F.2d 883 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 287 (1993).

134. *Id.* at 885, 887 n.6. Damages were awarded as follows: Compensatory $10,000; Attorney's Fees $5,000; Punitive $31,800. *Id.* at 885.

135. *Id.* at 887.

136. *Id.* at 886.

137. *Id.* at 887.

138. *Id.* at 888 n.7.

139. *Id.* at 889 (Beam, J., dissenting).

140. *Id.*

141. 943 F.2d 1056 (9th Cir. 1991).

142. *Id.* at 1059. Damages were awarded as follows: Compensatory $6 million; Punitive $1 million. *Id.* at 1060-61.

143. *Id.* at 1059 n.1, 1061 n.2.

144. *Id.* at 1062.

145. *Id.* at 1063.

even dispositive, that AAA rules were part of the contract.[146] Such rules are then construed to override contrary choice of law clauses.

e. Eleventh Circuit: *Bonar v. Dean Witter Reynolds, Inc.*[147]—The Bonars filed a demand for arbitration with the AAA, seeking compensatory and punitive damages against the brokerage firm.[148] Even though Dean Witter successfully challenged the investor's expert witness on grounds of perjury, the court upheld the power of arbitrators to award punitive damages.[149] The court first considered the interplay between AAA rules and the agreement's New York choice of law clause. Under the rule of construction established in *Willoughby Roofing & Supply Co. v. Kajima International, Inc.*,[150] the *Bonar* court found that the FAA and the customer agreement authorized punitive damages. Therefore, the additional choice of law clause did not deprive arbitrators of this power.[151] Second, and more interesting for future litigation, the court considered whether the customers waived their right to punitive damages by signing the customer agreement. Since the agreement never mentioned punitive damages, the court found there could be no waiver because the agreement is thereby ambiguous and not a "voluntary and intentional relinquishment of a known right."[152]

The concurring opinion in *Bonar* also raises a provocative question for future litigation by focusing on the actual intent of the parties. The *Bonar* majority and other courts upholding punitive damages awards have presumed, as the AAA requires, that such relief is contemplated by the parties. Yet Judge Tjoflat pointed out that all the parties really did was agree to submit *contract disputes* to arbitration, and that punitive damages should be available only if there is an express provision in the agreement authorizing them.[153]

f. Lower courts.—

(i) Ehrich v. A.G. Edwards & Sons, Inc.[154]—Lorraine Ehrich petitioned the court for confirmation of an arbitration award including punitive damages. Under state law, punitive damages were available, and AAA rules governed.[155] The court rejected the *Garrity* rule, reasoning that federal law applied pursuant to the FAA. It upheld the arbitrator's ability to "fashion appropriate remedies" and found that punitive damages

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146. *Id.* at 1063 n.6. *See also* Peloso & Sarnoff, *supra* note 124, at 27; Edward Brodsky, *Punitive Damages in Arbitration*, N.Y.L.J., April 13, 1994, at 3, 11 (federal law applied to issue of arbitrators' power and New York law applied to setting amount of damages); Carolyn M. Penna, *Enforceability of Punitive Damages Awards*, N.Y.L.J., Dec. 5, 1991, at 3, 7.

147. 835 F.2d 1378 (11th Cir. 1988).

148. *Id.* at 1380. Damages were assessed as follows: Compensatory $9,007.32; Punitive $150,000. *Id.* at 1380 n.3, 1381.

149. *Id.* at 1380-81, 1387.

150. 598 F. Supp. 353 (N.D. Ala. 1984).

151. *Bonar*, 835 F.2d at 1387. *See Willoughby*, 598 F. Supp. at 353; Ormsten, *supra* note 71, at 31. *Accord* Singer v. E.F. Hutton & Co., 699 F. Supp. 276 (S.D. Fla. 1988).

152. *Bonar*, 835 F.2d at 1387.

153. *Id.* at 1388-89 (Tjoflat, J., concurring).

154. 675 F. Supp. 559 (D.S.D. 1987).

155. *Id.* at 563 n.7, 564 & n.8. Damages were awarded as follows: Compensatory $193,444; Punitive $97,341. *Id.* at 560-61.

were within the scope of the parties' agreement to arbitrate.[156]

(ii) Willis v. Shearson/American Express, Inc.[157]—In *Willis*, the customer filed suit in court for securities fraud and the brokerage firm motioned to stay proceedings pending an arbitration of the claims pursuant to the parties' agreement. The *Willis* court distanced itself from *Garrity* pointing out that the latter dealt only with the powers of arbitrators under state law and that since the FAA is applicable here, federal law controls.[158] Accordingly the court ordered arbitration, warning that if "an issue is arbitrable under federal law, it remains so despite contrary state law."[159]

(iii) J. Alexander Securities, Inc. v. Mendez.[160]—In *Mendez*, the securities firm appealed from the judgment against it which included punitive damages. The agreement incorporated NASD rules and a New York choice of law clause.[161] Like *Bonar,* the court reconciled federal and state law, whereby federal law vested arbitrators with the power to award punitive damages, and the choice of law provision was used only to determine whether the facts of the case were sufficiently egregious so that such damages were warranted.[162]

As to the issue of the parties' intent and whether they contemplated an award of punitive damages when they entered into their agreement, the court concurred with the other courts that have upheld awards of punitive damages. It reasoned that since the language was unclear, neither including nor excluding the award of punitive damages, it would look to other contract clauses. The court found the other clauses "sufficiently broad to encompass the award[] of punitive damages,"[163] and it reached this conclusion despite the fact that AAA rules did not govern the arbitration. This is the broadest interpretation yet of NASD rules and is based on "prevailing policy in California."[164]

2. Decisions Invalidating Punitive Damages Awards.—

a. Second Circuit: Barbier v. Shearson Lehman Hutton, Inc.[165]—The Barbiers filed a claim of arbitration upon learning that their investment account had been nearly depleted. The parties' agreement was governed by a New York choice of law clause and they chose to arbitrate under NYSE rules.[166] The broker and firm filed a motion to vacate the entire award to the Barbiers, a portion of which included punitive damages. The court made quick work of resolving the issue because it found the choice of law clause, which adopted the New York rule prohibiting punitive damages, to be dispositive. In form, the

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156. *Id.* at 565.

157. 569 F. Supp. 821 (M.D.N.C. 1983).

158. *Id.* at 823.

159. *Id.* at 824-25. The arbitration provision was identical to that in *Barbier* and *Mastrobuono*. *See infra* notes 165-172.

160. 21 Cal. Rptr. 2d 826 (Cal. Ct. App. 1993), *cert. denied*, 114 S. Ct. 2182 (1994).

161. *Id.* at 827-28. In the Supreme Court's denial of *certiorari*, a dissent urged the majority to reconsider, noting that this decision in *Mendez* irreconcilably conflicts with the Seventh Circuit's *Mastrobuono* decision. Damages in *Mendez* were awarded as follows: Compensatory $27,000; Punitive $27,000.

162. *Id.* at 830. *See* Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1387 (11th Cir. 1988).

163. *Mendez*, 21 Cal. Rptr. 2d at 830-31.

164. *Id.* at 831. The court expressly distinguished itself from *Fahnestock* and *Barbier*.

165. 948 F.2d 117 (2d Cir. 1991).

166. *Id.* at 119. Damages were awarded as follows: Compensatory $130,645; Punitive $ 25,000. *Id.*

facts are most closely aligned with those of the *Mendez* case, yet the results irreconcilably conflict. The *Barbier* court relied heavily on *Volt,* which observed that the FAA mandates enforcement of private agreements according to their terms. The court reasoned that since the parties "elected to abide" by New York law, they would be held to their bargain.[167] Although there was room in such a response to question the parties' intent, the court refused to consider it. This case must certainly rank among the least distinguished of Second Circuit opinions, as it is devoid of depth of analysis and consideration of the equities of the parties.

b. Seventh Circuit: Mastrobuono v. Shearson Lehman Hutton, Inc.[168]—As in *Mendez* and *Barbier,* the parties in *Mastrobuono* signed a PDAA that was governed by a New York choice of law clause, and submitted their dispute to arbitration under NASD rules. The NASD Code of Arbitration Procedures made no mention of punitive damages, but its Arbitrator's Manual specifically allowed for punitive damages as a remedy.[169] Recognizing the conflict between the courts considering such issues, the *Mastrobuono* court opted to follow the implications of its previous decisions,[170] and favored the choice of law clause over the choice of arbitration rules clause.[171] Thus, in its words, "the *Garrity* rule always controls," regardless of the arbitration rules agreed upon.[172] Because the Seventh Circuit concluded that all disputes were subject to *Garrity*, it reasoned that there was no need to consider preemption issues in reliance on *Volt*, which acknowledged that state laws may co-exist with federal laws under certain conditions.

c. Lower courts.—

(i) Shahmirzadi v. Smith Barney, Harris Upham & Co.[173]—In this early case, when federal securities claims were not yet considered arbitrable, it was typical that the plaintiff customers filed suit in court and the brokerage firm sought arbitration. The PDAA was governed by New York law and arbitration rules were to be chosen among those of the NYSE, NASD or AMEX.[174] The court rejected the Shahmirzadis' attempt to invalidate

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167. *Id.* at 122. *See* Fahnestock & Co. v. Waltman, 935 F.2d 512 (2d Cir. 1991) (involving an employer-employee arbitration in which a punitive damages award of $100,000 based on damages of $156,000 was vacated pursuant to *Garrity*). *See generally* Smith Barney, Harris Upham & Co. v. Luckie, Nos. 11 & 13, 1995 N.Y. LEXIS 233 (Feb. 21, 1995) (statute of limitations issue to be resolved by court rather than arbitrator since parties chose New York law).

168. 20 F.3d 713 (7th Cir. 1994), *rev'd*, 115 S. Ct. 1212 (1995).

169. *Id.* at 717. *See also Mastrobuono*, 812 F. Supp. 845 (N.D. Ill. 1993); *Mastrobuono*, 128 F.R.D. 243 (N.D. Ill. 1989). Damages were awarded as follows: Compensatory $159,327; Punitive $400,000. *Mastrobuono*, 20 F.3d at 715. *Cf.* Baselski v. Paine, Webber, Jackson & Curtis, Inc., 514 F. Supp. 535 (N.D. Ill. 1981).

170. *See* Independent Employees' Union v. Hillshire Farm Co., 826 F.2d 530 (7th Cir. 1987) (noting arbitral remedies rarely include punitives); Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334 (7th Cir. 1984) (finding that plaintiffs' failure to inquire about arbitration clause language is not a sufficient reason to avoid its consequences).

171. *Mastrobuono*, 20 F.3d at 717-18. The court characterized this as the "more sensible" approach. *Id.* at 717. *But cf.* Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704 (7th Cir. 1994) (upholding award of punitive damages in arbitration involving tort, rather than contract issues).

172. *Mastrobuono*, 20 F.3d at 718.

173. 636 F. Supp. 49 (D.D.C. 1985).

174. *Id.* at 55-56.

the PDAA and found that "the signing . . . of the . . . agreement, which was governed by New York law and included an arbitration clause, was a contractual waiver of the right to punitive damages."[175] Like other courts relying on *Garrity*, the court refused to consider the parties' intent as to whether signing the PDAA containing a New York choice of law clause amounted to a knowing and voluntary waiver. The effect, of course, rewards brokers for drafting clauses without explaining their significance to customers; it penalizes customers for not asking about each word in agreements that are not truly bargained for exchanges between parties of equal negotiating power, but were instead issued to them on a take-it-or-leave-it basis.

B. The United States Supreme Court's Decision

1. Mastrobuono v. Shearson Lehman Hutton, Inc.[176]—Shortly after *Mendez* and faced with a mounting body of conflicting opinions, the Supreme Court granted *certiorari* in *Mastrobuono*. It considered whether the Seventh Circuit erred in holding that state rather than federal law governs the arbitrability of claims for punitive damages, and whether a party waives the right to such awards when signing a PDAA with a New York-style choice of law clause.[177] The investors asked the Court "to hold that the FAA pre-empts New York's prohibition against arbitral awards of punitive damages because this state law is a vestige of the ' " 'ancient' " ' judicial hostility to arbitration."[178] The brokerage firm responded by asserting that the choice of law clause "evidences the parties' express agreement that punitive damages should not be awarded in the arbitration of any dispute arising under their contract."[179]

In determining how best to sort out the two clauses, the Court first considered what effect each would have, had it appeared alone in the PDAA. Viewing the choice of law clause in isolation, the Court declined to read it as broadly as the firm urged, reasoning that as written it still "was not, in itself, an unequivocal exclusion of punitive damages

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175. *Id.* at 56.

176. 115 S. Ct. 1212 (1995), *rev'g* 20 F.3d 713 (7th Cir. 1994).

177. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 305 (1994); 63 U.S.L.W. 3281 (U.S. Oct. 11, 1994). *Mendez* recall, was denied review by the Supreme Court, but was accompanied by a dissent, which is unusual for the Court.

178. *Mastrobuono*, 115 S. Ct. at 1215; *see also* Petitioners Brief, *supra* note 105; Brief for the United States and the Securities and Exchange Commission, Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713 (7th Cir. 1994) (No. 94-18) (supporting Petitioners assertion that punitive damages are proper remedy); Brief for the Public Investors Arbitration Bar Association, Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713 (7th Cir. 1994) (No. 94-18) (asserting that New York law is contrary to the principles that underlie the FAA); Brief for American Association of Limited Partners, Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713 (7th Cir. 1994) (No. 94-18) (asserting that the Seventh Circuit's opinion threatened investors rights by impairing their ability to recover damages). *Cf.* Allied - Bruce Terminix Cos. v. Dobson, 115 S. Ct. 834 (1995) (upholding PDAA in spite of contrary state law).

179. *Mastrobuono*, 115 S. Ct. at 1216; *see also* Respondents Brief, *supra* note 105; Brief for the Securities Industry Association, Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713 (7th Cir. 1994) (No. 94-18) (parties chose New York law and must abide by it, and enforcing terms according to the agreement is consistent with *Volt* and the goals of FAA).

claims."[180] When the Court next considered the arbitration rules clause in isolation, it found that the firm's argument did not improve.[181] When read alone, there is a strong implication that a punitive damages remedy is appropriate since the rules do not purport to limit arbitrators' discretion in making such awards.[182]

The Court then considered the two clauses together and decided in favor of the investors. It reasoned that, "[a]t most, the choice of law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards."[183] The Court relied on two cardinal principles of contract interpretation to reach its conclusion: (1) ambiguities are to be construed against the interests of the drafting party, and (2) documents should be read to give effect to all clauses, reconciling them if at all possible.[184] By calling into question the various interpretations that could be attached to the choice of law clause, and construing this ambiguity against the broker, the Court avoided a *Volt*-type preemption analysis. *Mastrobuono* thus emphasizes that arbitrators have broad powers to resolve disputes, especially where customers have a claim against the brokerage firms that drafted the parties' agreement.

The eight to one decision was punctuated by a dissent from Justice Thomas, who argued that *Mastrobuono* is virtually indistinguishable from *Volt*, and thus New York law prevails since the FAA simply requires courts to enforce privately negotiated agreements according to their terms.[185] Justice Thomas considered the NASD authorization of punitive damages awards in the Arbitrators' Manual not even to be part of the NASD rules, and finally, lamented "that the parties made their intent clear, but not in the way divined by the majority."[186]

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180. *Mastrobuono*, 115 S. Ct. at 1216-17. The clause stated that the "agreement . . . shall be governed by the laws of the state of New York." *Id.* at 1216-17 & n.2. Perhaps the firms were reluctant to spell out in such stark terms the meaning and effect of the choice of law clauses.

181. *Id.* at 1218.

182. *Id.* at 1218 n.5. The Court recently heard oral argument on a case concerning the scope of review for arbitrators' decisions. *See* First Options of Chicago, Inc., v. Kaplan, 115 S. Ct. 634 (1994) (granted *certiorari* to review 19 F.3d 1503 (3d Cir. 1994)).

183. *Mastrobuono*, 115 S. Ct. at 1218. *See also* Karen Donovan, *The Investors Win; Experts Debate Effect*, NAT'L L. J., Mar. 20, 1995, at B1 (citing litigation consultant's opinion that Court "more or less suggested that clearer drafting could avoid the problem"); *High Court Hears Debate on Award of Punitive Damages in Arbitration*, U.S.L.W., Jan. 11, 1995, *available in* LEXIS, Genfed Library, USPLUS File. The article summarized comments made at oral argument; Justice O'Connor queried whether parties even contemplated punitive damages; Justice Souter stated that NASD rules were agnostic on such damages; Justice Breyer's questions were prescient where he asked why there is not at least an ambiguity between the clauses and therefore the parties must abide by the arbitrator's decision. *Id.*

184. *Mastrobuono*, 115 S. Ct. at 1219; *see also* Kelly v. Michaels, No. 94-5023, 1995 U.S. App. LEXIS 16782 (10th Cir. July 10, 1995) (first appellate decision since *Mastrobuono*, and it upheld a punitive damages award despite a New York choice of law clause).

185. *Mastrobuono*, 115 S. Ct. at 1219-23 (Thomas, J., dissenting).

186. *Id.* at 1223.

IV. SECURITIES ARBITRATION DISPUTES AND PUNITIVE DAMAGES FOLLOWING *MASTROBUONO*

What *Mastrobuono* solves and leaves open for further consideration are of course many of the most interesting points. Essentially the Court looked at the PDAA, found ambiguities, and resolved them against the firm which had drafted the document. The case then, is a most helpful warning to firms (and to a lesser extent, customers) that the agreement and exact effect of clauses must be made clearer to average investors. But can't ambiguity be found anywhere if one looks hard enough? It is extremely rare to find the perfect "bulletproof" document, balancing concerns of informed consent with concerns of revealing proprietary information, or other information about the investment process deemed possibly so alarming as to "scare off" investors.

The decision, as sensible as it is, failed to discuss the issue of waiver. Although it would be *dicta* under its holding, waiver issues will arise in future cases, because even when a party signs an agreement, it is unclear when a waiver will effectively relinquish certain rights. Cases following *Garrity* found that parties had waived rights by signing the PDAA even though realistically they did not know the true effect of the New York clause. Can signing this waiver be said to be knowing and voluntary? On the other hand, agreeing with the majority of circuit courts has the effect of rewarding investors who took no steps to inquire about the contents of the PDAA they signed and of the effect of the New York clause. This begs the question of exactly what the parties contemplated. The Supreme Court again did not discuss this in detail because it is impossible to divine the intent of each party. It would suffice to say that the investors probably thought they could pursue all the "usual remedies." The firms probably thought the agreement effectively excluded punitive damages as a remedy.[187] Thus, on this issue there was very likely, no "meeting of the minds" whatsoever. What then can be said for the PDAA as a whole? Does this render the contract null and void, or is the clause severable where intent was lacking and the parties were, most likely, at cross-purposes, at least with respect to remedies?

The better rule is to allow all forms of relief that would have been available had the case been litigated in court. This reinforces the process of arbitration by recognizing its legitimacy as a dispute resolution forum. This is so even if it is somewhat at the expense of the rule of contract construction of precisely determining the parties' intent. It seems that only when PDAAs truly represent the intent of both parties who actively negotiate it and have equal bargaining power, may the parties' intent really be scrutinized by courts to determine whether a party has waived any rights. But because this does not, and will never, realistically occur with standard form agreements, it behooves parties to recall *Mitsubishi's* expansive reading of contract language noting that parties' intentions control, but are generously construed as to issues of arbitrability.

Some judges have expressed a reluctance to infer power to award punitive damages absent express authorization under arbitration rules or state law. To address the related problems of the parties' intent and arbitrators' powers, securities arbitration rules and

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187. *See* Lee v. Chica, 983 F.2d 883, 888-89 (8th Cir. 1993) (Beam, J., dissenting); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1388-89 (11th Cir. 1988) (Tjoflat, J., concurring). *See generally* Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995) (holding invalid an agreement to arbitrate employment disputes because employees did not knowingly waive their statutory rights).

PDAAs and their relation to state law should be made uniform. To have the process degenerate into a forum-shopping expedition undermines the integrity of the process. There has been a movement to restrict punitive damages awards in securities arbitration, but such plans must be scrutinized closely by the SEC, the main regulatory agency to ensure that all interested parties' positions are considered.[188]

Other strategies to unify the rules across all jurisdictions may include a congressional amendment to the FAA that adds a preemption clause reserving plenary power to itself to regulate arbitration, thus precluding any state regulation. This would accomplish what volumes of litigation cannot. It would provide an acceptable level of predictability in the outcome of these cases and would create a rule of law that is recognized and followed. Federalizing punitives damages awards is an object of interest in House Speaker Gingrich's "Contract with America," albeit with the intent of placing caps on such awards.

The *Mastrobuono* Court avoided preemption and Supremacy Clause issues in its discussion—issues surely to arise in future cases unless arbitration is federalized. Because the FAA does not contain a preemption provision, the Court was obliged to read the federal and state laws harmoniously, and to the extent an actual conflict existed, federal law would prevail. The investors in *Mastrobuono* adopted the position that the FAA and the New York choice of law clause actually conflicted, but the Court found that the laws did not, and so construed them to render both valid. This does not, however, totally discourage the practice of quietly inserting clauses favorable to the party who drafted the agreement. Nor does it eradicate the practice of forum-shopping.[189] Furthermore, if as the Court states, interpretation of PDAAs is ultimately a matter of state law, will cases go to those state courts receptive to a certain party's agenda? This scenario further erodes the sound development of law in securities arbitration cases.[190]

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188. *See* Michael Siconolfi, *NASD's Bid to Limit Punitive Damages in Arbitration Cases Worries Regulators*, WALL ST. J., Sept. 12, 1994, at A11 (proposal made amid a surge in punitive damages awards); Susan Antilla, *An Arbitration Plan Goes Begging*, N.Y. TIMES, Jan. 9, 1994 § 3, (Business), at 15 (noting unpopularity of NASDs proposal even in securities industry); Barbara Franklin, *Securities Arbitration*, N.Y.L.J., June 3, 1993, at 5 (citing NASD proposals of a cap on damages, minimal standard of egregious behavior to qualify for awards, and allow more review of awards). *See generally* J. Carter Beese, *Stop Choking Wall Street*, N.Y. TIMES, June 27, 1995, at A17 (supporting changes in securities laws to restrict "frivolous" litigation); Jane Fritsch, *Securities-Bill Staff Has Ties to the Industry*, N.Y. TIMES, May 25, 1995, at A1 & B13; Anthony Lewis, *Make Haste Slowly*, N.Y. TIMES, May 15, 1995, at A17 (opposing Congress's attempt to selectively interfere with state laws).

189. *See generally* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer, No. 94-2297, 1995 U.S. App. LEXIS 3993 (7th Cir. Mar. 1, 1995), *reh'g denied*, 1995 U.S. App. LEXIS 7555 (7th Cir. Apr. 4, 1995). This dispute is typical of cases containing choice of law clauses that degenerate into a game of forum-shopping.

190. *See* Eric Rieder, *High Court Decisions Leave Questions Unanswered*, N.Y.L.J., Mar. 30, 1995, at 5. Other thorny issues remain as well. For example, some courts are reluctant to award attorneys' fees where the agreement is silent on this question. *See* PaineWebber v. Richardson, No. 94-3104 (S.D.N.Y. Apr. 21, 1995). Additionally, while most PDAAs contain a six year time limit provision in which to file a claim, some courts nevertheless claim jurisdiction over the case claiming they, not the arbitrators, are uniquely responsible for handling this matter. *See* Daniel Wise, *Time Limit Issues Not Arbitrable: Broker-Purchaser Agreements Interpreted*, , July 3, 1995, at 1; Gary Spencer, *State Role in Securities Arbitrations Defined*, N.Y.L.J., Feb. 22, 1995, at 1. Lastly, one New York court has considered whether there is even personal jurisdiction over the customer who lived in Florida, and whose only contact with New York was the filing of a request to arbitrate.

There are also some real and continuing problems that must be addressed not in court, but at the contracting and transactional phases of the parties' relationship. It is almost as if this conflict between investors and brokers is institutionalized, and clauses highly favorable to one party do much to foster mistrust and misunderstanding by the other party. Until such matters are resolved, securities arbitration disputes over punitive damages and other questions will waste a great deal of time and resources.

Securities industry opposition to punitive damages runs high at the present time, but if their business practices were more sound, would this not lessen their exposure, and *a fortiori*, their opposition to punitive damages?[191] The SEC has recently issued a report detailing such problems inherent in the industry. Indeed, SEC Chair Arthur Levitt, Jr. said: "The perception is strong that compensation practices create conditions that foster abuse."[192] When brokers are paid sales commissions, it creates an incentive for brokers to churn customers' accounts, perhaps without having due regard for net return to the customer. The SEC's report offered recommendations for better ways of aligning the interests of the investor with those of the broker and firm.[193] Such recommendations, in theory, make punitive damages a secondary issue, a symptom of the real issue of egregious misconduct perpetrated by brokers and their firms. Also, to a lesser extent, the lack of responsibility by investors who need to be more vigilant has added to this situation. To make punitive damages awards the flashpoint is to miss the real problem.

A final matter that remains after *Mastrobuono* relates to whether a punitive damages award in a securities arbitration dispute may be regarded as so excessive as to violate the Fourteenth Amendment's Due Process Clause. Recall, in Part II of this Article, an award could be held so excessive that it constitutes an arbitrary deprivation of property.[194] An award will be upheld if there are sufficiently definite and meaningful constraints to ensure that an arbitrator's decision is made in a meaningful and deliberate manner. The stakes are higher in a case where arbitral punitive damages have been awarded because of the extremely limited grounds that exist for challenging an arbitration decision.[195]

Two approaches show the most promise in resolving appeals of arbitrators' awards.

See Cerisse Anderson, *N.Y. Courts Powerless to Stay Out-of-State Arbitrations*, N.Y.L.J., Feb. 24, 1995, at 1.

191. *See* Constantine N. Katsoris, *Should McMahon be Revisited?*, 59 BROOK. L. REV. 1113, 1141-53 (1993). *See generally* Susan Antilla, *One Client That Wall Street Regrets*, N.Y. TIMES, Sept. 26, 1994, at D1.

192. Peter Truell, *Changes Sought in Brokers' Pay Policies*, N.Y. TIMES, Apr. 11, 1995, at D6. *See generally* Susan Antilla, *When It's Your Word Against Your Broker's*, N.Y. TIMES, Aug. 13, 1995, § 3 (Money and Business), at 3; Susan Antilla, *Brokerage Firms Steer Dissatisfied Customers Away From Court, But in Only One Direction*, N.Y. TIMES, May 12, 1995, at A29 (questioning fairness of 'self-regulatory' arbitration); Susan Antilla, *For the Fee-Hungry, Stars Are a Banquet*, N.Y. TIMES, Apr. 2, 1995, § 3 (Money and Business), at 4.

193. U.S. SECURITIES AND EXCHANGE COMMISSION, REPORT OF THE COMMITTEE ON COMPENSATION PRACTICES (April 10, 1995); *see also* Micahel Siconolfi, *Revised Rules Are Mapped for Securities Arbitration*, WALL ST. J., Nov. 11, 1995, at C1; Leah Nathans Spiro & Michael Schroeder, *Can You Trust Your Broker?*, BUS. WEEK, Feb. 20, 1995, at 70-76.

194. *See supra* notes 73-90 and accompanying text.

195. *See* Kelley v. Michaels, No. 94-5023, 1995 U.S. App. LEXIS 16782, at *14-15 (10th Cir. July 10, 1995) (considering, then rejecting, brokers' due process challenge to punitive damages award); 9 U.S.C. § 10 (1994); Brian N. Smiley, *Stockbroker - Customer Disputes: Making a Case for Arbitration*, 23 GA. ST. B.J. 195 (1987).

First, it is possible to amend the FAA and lessen the currently rigorous standard of review. Grounds for review are so limited presently that there must be evidence of a manifest disregard for the law before a court may vacate an arbitrator's decision. This rule of review for arbitral decisions is in sharp contrast to the less rigorous de novo standard of review in which the court merely "stands in the shoes of the [trial] court."[196] Under the former standard, the appellate court begins its analysis with a presumption in favor of the arbitral decision, under the latter it does not. In limited instances, the de novo standard is used to review arbitration decisions.[197] To the extent that review of arbitral awards of punitive damages is altered, allowing for more judicial scrutiny, the risk of violating the Due Process Clause is lessened. However, one has to wonder if the means to this end are desirable.

Second, it is possible to further formalize the procedures for awarding punitive damages in arbitration by requiring the arbitrators to issue written opinions. Formalizing and unifying procedures will greatly reduce the risk of an arbitrary, erroneous deprivation of property without due process of law.[198] When a written decision is rendered that explains the reasons for awarding damages, including the procedures used for reaching the result and the formula used for the calculations, the risk of an erroneous decision is lessened.[199] This also obviates the need for an appeals court to make a more searching review of the arbitration procedure.

There is also the possibility of bifurcating the arbitration proceeding and considering punitive damages issues in a judicial, rather than arbitral forum. This is, however, an ill-considered approach to the problems because it would undermine the entire process of arbitration.

Finally, it may be desirable to set a maximum allowable punitive damages award. Conditions could be specified and if an award is deemed merited, arbitrators could award up to, for example, three times the compensatory damages.[200] This somewhat standardizes awards by limiting the arbitrators' discretion, and will not as readily offend the Due Process Clause.

Under these approaches, the due process problems of excessive punitive damages are ostensibly solved, but at what price? Under the first theory the FAA is diluted and the courts' power is strengthened. Under the second theory, the FAA and the courts' roles remain relatively the same, but the arbitrators' roles are expanded and more is demanded of them. If securities and commercial arbitration are to remain viable forums for alternative dispute resolution (ADR), the problem of excessive punitive damages must be

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196. First Options of Chicago, Inc. v. Kaplan, 19 F.3d 1503, 1509 (3d Cir. 1994) (quoting Mutual Fire, Marine, & Inland Ins. Co. v. Norad Reins. Co., 868 F.2d 52, 56 (3d Cir. 1989)).

197. *Compare Kaplan*, 19 F.3d at 1509 (Third Circuit restated that its present standard of review, de novo, is used in considering trial court's denial of motion to vacate a commercial arbitration award.) *with* Robbins v. Day, 954 F.2d 679, 681-82 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992) (Eleventh Circuit reviewed decisions denying petitions to vacate award using manifest disregard for the law standard.).

198. *See* Katsoris, *supra* note 191, at 1132-37.

199. *Id.* at 1140-41; Christopher F. Wilson, *Punitive Damages in Securities Arbitrations*, 26 Sec. & Comm. Reg. 203-09 (Nov. 24, 1993); Stewart, *supra* note 5, at 365-67.

200. *See supra* notes 9, 43; *see also* Miley v. Oppenheimer & Co., 637 F.2d 318 (5th Cir. 1981) (comparing punitive damages awards calculations).

solved. It remains to be seen, however, whether the solution will lead to further problems by increasing the time and money required for arbitration.[201] One of the goals, of course, for any ADR technique, is to reduce both the time and expense it takes to resolve the parties' legal claims. If securities arbitration becomes as expensive and time consuming as litigation then the value of the technique is lost. Increasing the layers of procedure and protection in arbitrators' decision-making stages may add time and expense, unless the whole system is restructured, streamlined and made uniform throughout the securities industry.

CONCLUSION

The Court has taken many opportunities to reaffirm its expansive reading of the FAA. It has perhaps taken an equal number of opportunities, to consider when punitive damages awards may offend the Due Process Clause. Securities arbitrators have had to navigate their way between choice of law clauses and arbitration forum rules, and will have to continue to do so, barring more definitive decisions by the SEC, the SROs, Congress, or the courts. Punitive damages must be available as a remedy in securities arbitration. Relief granted by arbitrators must be congruent with relief available in court. Courts are being asked too frequently to intervene in securities arbitrations. Punitive damages must never be considered waived absent clear evidence of an affirmative intent to do so. For punitive damages awards to withstand constitutional due process challenges, more detailed procedures must be added to ensure that they are the product of reasoned decision-making and that there are meaningful constraints on arbitrators' discretion. Finally, because securities arbitration is a contractually agreed upon process, every care must be taken to draft the document in such a way as to allocate risk fairly and to ensure that it represents the complete intent of *both* parties. The investor must take responsibility for being fully informed of the force and effect of all clauses. The broker and the securities firm are responsible for managing investors' funds in a way that maximizes investors' returns using appropriate investments, while minimizing self-dealing and other conflicts of interest. Fairness, and the perception of fairness are requisite elements for the continued legitimacy of the securities arbitration system.

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201. *See* GAO REP'T, *supra* note 106, at 43, 64-65; Stewart, *supra* note 5, at 366-67 (concluding that arbitration has come to resemble litigation system it was meant to replace); Jerry Knight, *NASD to Offer Mediation for Broker-Investor Fights*, WASH. POST, July 23, 1995, at H05; *Mediation Offered to Settle Securities Disputes*, REUTERS LTD., July 20, 1995, *available in* LEXIS, News Library, CURNWS File (citing SECs approval of new mediation rules); Susan Antilla, *The Next Magic Bullet? Mediation*, N.Y. TIMES, Feb. 5, 1995, § 3 (Business), at 13 (citing NASD support for mediation of securities disputes as an alternative to ever-more complex arbitration system).

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NOTES

THE LINK BETWEEN PRIVATE AND PUBLIC SINGLE-SEX COLLEGES: WILL WELLESLEY STAND OR FALL WITH THE CITADEL?

KARLA COOPER-BOGGS*

INTRODUCTION

In the fall of 1992, high school senior Shannon Faulkner submitted an application for admission to the Citadel, a state-funded, all-male, military college in Charleston, South Carolina. Founded in 1842, the Citadel is a prestigious college, with a long and proud history. Novelist Pat Conroy, a Citadel alumnus, has described it as "Charleston's shrine to Southern masculinity."[1] However, because of the intense physical and mental challenges which cadets are subjected to as part of their education, the Citadel has also earned the reputation of "the big bad macho school . . . ."[2] Freshmen, called "knobs" because their heads are shaved to resemble doorknobs, must follow upperclassmen's orders, and may utter only three responses when spoken to: "Sir, yes, sir," "Sir, no, sir," and "Sir, no excuse, sir."[3] Like many other ambitious South Carolina teenagers, Shannon dreamed of rising to the challenges of a Citadel education, bonding with fellow Citadel cadets, and becoming part of the powerful Citadel alumni network, which includes many prominent Southerners, most notably General William C. Westmoreland (Class of 1935), Senator Ernest F. Hollings (1942) and the Mayor of Charleston, Joseph P. Riley, Jr. (1964).[4]

Faulkner was indeed an impressive candidate, having maintained a 3.48 grade-point average while also playing varsity softball for four years and editing the yearbook.[5] In the spring of 1993, the college sent Shannon a letter of acceptance addressed to "Mr. Shannon Faulkner." The Citadel was, of course, shocked to learn that Shannon Faulkner was a young woman, and immediately retracted its offer of admission. Faulkner had convinced

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1. Pat Wingert, *Oh, to Be a Knob!*, NEWSWEEK, Aug. 22, 1994, at 22, 22.
2. Susan Faludi, *The Naked Citadel*, THE NEW YORKER, Sept. 5, 1994, at 62, 62.
3. Wingert, *supra* note 1, at 22.
4. Catherine S. Manegold, *'Save the Males' Becomes Battle Cry in Citadel's Defense Against Woman*, N.Y. TIMES, Sept. 11, 1994, at A10. Interestingly, one Citadel alumnus and spokesman, Major Rick Mill, has said, "I don't know how she thinks she is going to benefit from all this alumni networking when right now that group is collecting money to keep her out." *Id.*
5. Faludi, *supra* note 2, at 74.

a high school guidance counselor to delete all references to her gender on her high school records, and she simply filled out the application, which asked no questions about gender. After the Citadel retracted her offer of admission, Faulkner filed suit against the Citadel, claiming that its single-sex admissions policy violated her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment.[6] The District Court ordered the Citadel to admit Faulkner to the Corps of Cadets immediately, and required the Citadel to formulate and implement an admissions policy that would conform with the Equal Protection Clause in time for the 1995-1996 school year.[7] The Fourth Circuit Court of Appeals affirmed this decision in April of 1995.[8]

This Note examines the *Faulkner* case and its relation to the admissions policies of women's colleges. Part I of this Note will explain the legal arguments involved in the *Faulkner* case and in a recent case against the all-male, publicly supported Virginia Military Institute (VMI),[9] which dealt with many of the same issues. Part II will briefly examine the feminist arguments in support of single-sex education for women, the attempt to reconcile that position with Shannon Faulkner's cause, and the link between private women's colleges, the Citadel and VMI. Parts III, IV and V will focus on three legal theories which could be used to challenge the legality of the admissions policies of private women's colleges: The Equal Protection Clause, the tax-exempt status of private colleges, and the Commerce Clause.

I. THE CITADEL AND VMI CASES

The Equal Protection Clause states that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[10] Faulkner's case was heard by the Fourth Circuit Court of Appeals, which had previously decided a very similar case, *United States v. Virginia*.[11] The *Virginia* case involved the federal government's challenge to the single-sex admissions policy of the Virginia Military Institute. Like the Citadel, VMI is a public all-male military college that uses an "'adversative' educational model [that] emphasizes physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values."[12]

In the VMI case, the court explained that "all persons are in many important respects different and . . . were created with differences, and it is not the goal of the Equal

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6. Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993), *on remand*, 858 F. Supp. 552 (S.D.S.C. 1994), *aff'd, modified, remanded*, 51 F.3d 440 (4th Cir. 1995), *mot. denied*, 66 F.3d 661 (4th Cir. 1995), *cert. denied*, 1995 U.S. LEXIS 7113 (1995).

7. *Faulkner*, 858 F. Supp. at 569.

8. Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995).

9. United States v. Virginia, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993), *on remand, mot. granted*, 852 F. Supp 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *cert. granted*, 116 S. Ct. 281 (1995). The Supreme Court's decision in this case, which is expected in early 1996, may resolve some or all of the issues which were argued in the *Citadel* case as well.

10. U.S. CONST. amend. XIV, § 1.

11. 976 F.2d 890 (4th Cir. 1992).

12. *Id.* at 893.

Protection Clause to make them the same."[13] Thus, the Equal Protection Clause does *not* require that "all laws apply to all persons without regard to actual differences."[14] The court stated that "when a state regulation employs classifications, the defining criteria must have a 'fair and substantial relation' to the objective of the regulation."[15] Therefore, in order for VMI's admissions policy to be found constitutional, it had to satisfy the court's two-part test: (1) the class of persons to which a state regulation applies must be defined in a manner that fairly and substantially relates the class to the purpose of the regulation, and (2) the regulation must serve an adequate government purpose.[16]

Regarding the test's first prong, VMI argued that its egalitarian environment was necessary to fulfill its main purpose, to create "citizen soldiers."[17] The court agreed that several aspects of the VMI experience would be "materially affected by coeducation." The physical differences between men and women would require two levels of physical training, the two sexes would be entitled to some degree of privacy from each other, and interaction between men and women in the adversative program would "introduce[] additional elements of stress and distraction which are not accommodated by VMI's methodology."[18] The court used a paradoxical phrase from a popular novel to explain the problem: "The Catch-22 is that women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity."[19]

While VMI satisfied part one of the court's test, it failed part two. VMI claimed that the governmental purpose behind its discriminatory admissions policy was to offer educational "diversity."[20] The court, dissatisfied with this reasoning, noted that "the Commonwealth of Virginia has not revealed a policy that explains why it offers the unique benefit of VMI's type of education and training to men and not to women."[21]

Interestingly, the court's conclusion that VMI's admission policy violated The Equal Protection Clause did not lead the court to require that women be admitted to the college. The admission of women was only one option the court suggested along with others, such as establishing parallel all-female programs, or becoming a private institution.[22]

Since that decision, the State of Virginia has provided a similar program for women at Mary Baldwin College, a private all-women's college not far from VMI. At Mary Baldwin, students perform physical drills and focus upon developing leadership skills, but there is no hazing or humiliation. The court's approval of this "separate but equal" program for women has inevitably led to comparison between the VMI case and the infamous case which allowed (until it was overruled in 1954) "separate but equal"

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13. *Id.* at 895.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 896.
18. *Id.* at 896-97.
19. *Id.* at 897.
20. *Id.* at 898.
21. *Id.*
22. *Id.* at 900.

education for blacks and whites, *Plessy v. Ferguson*.[23] The constitutionality of the Mary Baldwin alternative program was recently argued before the Court of Appeals, and the court affirmed its previous decision, finding the remedy constitutional.[24]

The similarities to the VMI case were clearly recognized by the Faulkner Court of Appeals. In its decision granting Faulkner a preliminary injunction to attend Citadel day classes while a decision on the merits was pending, the court stated that "we can perceive no reason why our holding in VMI would not apply in this case."[25]

Unlike Virginia, however, the state of South Carolina had articulated a policy which attempted to justify the absence of an all-female military program in South Carolina. In May of 1993, two months after Shannon Faulkner filed suit against the Citadel, the following resolution was passed in the South Carolina General Assembly:

> South Carolina has historically supported and continues to support single-gender educational institutions as a matter of public policy based on legitimate state interests where sufficient demand has existed for particular single-gender programs thereby justifying the expenditure of public funds to support such programs.[26]

In support of the Citadel's admissions policy, the State of South Carolina argued that "single-sex educational opportunities are not available to women in South Carolina's public system of higher education because there is insufficient demand for them."[27] To support this claim of insufficient demand, the state presented evidence that due to the decline in female student enrollment at Winthrop College, an all-women's state-supported South Carolina college, the school had become coeducational more than twenty years prior to the Citadel controversy.[28] Also, the chairman of the South Carolina Commission on Higher Education testified that the Commission had received no requests for an all-female educational program since Winthrop began to admit men.[29]

In its April 1995 decision on the merits, the Court of Appeals upheld the district court's ruling that this evidence was insufficient to show a current absence of demand for women's single-sex education in South Carolina.[30] Interestingly, the court suggested that the absence of demand by members of one gender, if proven, may justify a state's failure to offer single-sex education to that gender, but it chose not to resolve this "difficult legal

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23. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954). For discussions of the "separate but equal" controversy, see Bennett L. Saferstein, Note, *Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637 (1993), and William A. Devan, Note, *Toward a New Standard in Gender Discrimination: The Case of the Virginia Military Institute*, 33 WM. & MARY L. REV. 489 (1992).

24. United States v. Virginia, 44 F.3d 1229 (4th Cir. 1995).

25. Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1994).

26. *Id.* at 229.

27. Faulkner v. Jones, 51 F.3d 440, 444 (4th Cir. 1995) (quoting Faulkner v. Jones, 858 F. Supp 552, 564 (S.D.S.C. 1994)).

28. *Id.* at 445.

29. *Id.* at 445-46.

30. *Id.* at 445.

issue" in the Citadel case.[31]

Ultimately, the court found that, like Virginia, the State of South Carolina had failed to justify its failure to provide women with single-sex educational opportunities. Therefore, the Citadel's admission policy was found to be in violation of the Equal Protection Clause, and the court ordered the Citadel to allow Faulkner to enter the Corps of Cadets in August of 1995, unless it could develop and implement a court approved alternative program for women in South Carolina.[32]

After the Court of Appeals' ruling, the Citadel and the state of South Carolina contributed ten million dollars to Converse College, a private all-women's college in Spartanburg, to create the South Carolina Institute of Leadership for Women.[33] Although the program began on August 30, 1995, with an enrollment of 22 women, the court has not yet approved this program as an "equal" alternative to the Citadel.[34] A United States district court judge was not expected to rule upon this issue until November of 1995.[35]

Because the Converse College program had not yet been ruled upon by the court, the Citadel was required to admit Shannon Faulkner to the Corps of Cadets in late August of 1995. During her first day of rigorous military training, Faulkner fell ill and was admitted to the college infirmary.[36] By the end of cadet initiation week, often referred to as "hell week," Faulkner, citing severe emotional stress, resigned.[37]

Many cadets rejoiced at the news of Faulkner quitting, but the lawyers who represented Faulkner promised that the case against the Citadel would go on without her.[38] In fact, representatives of the plaintiffs and of the defendants have petitioned the Supreme Court to review the case.[39] The Supreme Court, however, refused to grant certiorari. Nonetheless, the facts surrounding the *Faulkner* case will likely have far-reaching effects because of the growing experimentation throughout the country with single-sex education at all educational levels.

For example, in 1994, one public high school in Ventura, California, added an all-girls algebra class to its curriculum.[40] In addition to teaching math, the teacher spends time helping the girls to develop self-confidence in this male-dominated subject.[41] Apparently, the program is already working; the number of girls enrolling in advanced math classes has almost doubled, and many girls who had previously received bad grades in math are now earning A's and B's.[42]

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31. *Id.*

32. *Id.* at 450.

33. *22 Women Show up at Alternative to the Citadel*, N.Y. TIMES, August 31, 1995, at A13.

34. *Id.*

35. *Id.*

36. Catherine S. Mangeold, *Female Cadet Quits the Citadel Citing Stress of Her legal Battle*, N.Y. TIMES, August 19, 1995, § 1, at 1.

37. *Id.*

38. *Id.*

39. *Id.*

40. Susan Estrich, *For Girls' Schools And Women's Colleges, Separate Is Better*, N.Y. TIMES, May 22, 1994, § 6 (Magazine), at 38, 39.

41. *Id.*

42. Jon Glass, *Separated, Boys and Girls May Learn Better; Controversial Approach Limits*

At Bowling Park Elementary School in Norfolk, Virginia, all the academic subjects are taught in single-sex classrooms; only art and music classes are coeducational.[43] The children enjoy school more, are less inhibited in the classroom, and are less distracted by the opposite sex.[44] The school has never been challenged, but because of its public status school officials are aware that their program is likely to be found unconstitutional if the issue is taken to court.[45]

At least two public programs which offered classes for African-American males have been terminated in recent years for legal reasons. In 1989, a Dade County, Florida public elementary school created kindergarten and first grade classes exclusively for African-American boys.[46] In its first year, the program showed progress; attendance rates increased six percent, test scores improved six to nine percent and there was a "noticeable decrease in hostility" among the boys.[47] But after only one year, the United States Department of Education ended the program, having concluded that it violated civil rights laws.[48] Also, in 1991, the Detroit school district planned to open three all-boys schools in the inner city. Parents and civil rights groups filed suit and won, forcing the school district to abandon their plan.[49]

Although Shannon Faulkner did not attain her goal of becoming a Citadel graduate, her case, and the discussion it has fueled, will likely lead to changes in the law surrounding single-sex education for all ages and levels. Acknowledging the significance of her struggle, Faulkner has said, "I've tried to open the door. My knock isn't that big a sound. But it is like the knock in 'The Wizard of Oz.' It set up this echo through the halls until it was heard by everyone."[50]

II. TENSION WITHIN THE FEMINIST MOVEMENT

Although Faulkner "prefers to call herself 'an individualist' and seems almost indifferent to feminist affairs,"[51] she has become somewhat of a heroine in the women's rights movement as a result of her legal battle against the Citadel. Many feminists feel that her admission to the Citadel Corps of Cadets broke "the 152-year-old seal on a bastion of undiluted masculinity."[52] It seems that the logic of this feminist position conflicts, however, with another position within the movement—the support of women's colleges. Many women, including Shannon Faulkner, may not realize that their fight to enter the Citadel could lead to the demise of private women's colleges as well.[53] Some

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Intimidation, Classroom Distractions, VIRGINIAN-PILOT, Jan. 4, 1995, at A1.

43. *Id.*
44. *Id.*
45. *Id.*
46. Susan Tifft, *Fighting the Failure Syndrome*, TIME, May 21, 1990, at 83, 83.
47. *Id.* at 84.
48. *Id.*
49. Estrich, *supra* note 40, at 39.
50. Manegold, *supra* note 36, at 59.
51. Faludi, *supra* note 2, at 74.
52. Manegold, *supra* note 4, at A10.
53. Currently, there are two public women's colleges in the United States, Texas Woman's University

argue that most women's colleges are safe from constitutional challenges because they are private.[54] However, on average, private women's colleges receive approximately twenty percent of their operating costs from the government.[55] They receive the financial benefits of tax exemption, as well as various government grants. Many of the students who attend women's colleges receive government loans. Undoubtedly, these facts blur the distinction between private and public status and suggest that courts may treat all single-sex colleges similarly at some time in the future.

Many feminists believe that a single-sex education benefits girls and women. This opinion was brought to mainstream attention in 1982 by Carol Gilligan in her famous book, *In A Different Voice*, in which she argues that the moral development of girls significantly differs from that of boys.[56] The past decade has produced countless books about the differences between girls and boys and men and women.[57] In 1992, the American Association of University Women presented a controversial study, *How Schools Shortchange Girls*,[58] which included some disturbing findings. The study found that girls receive less attention and praise and fewer constructive comments from their teachers than do boys; teachers listen to boys, even when they call out an answer, but girls are instructed to raise their hands; sexual harassment reports are increasing in schools; and textbook descriptions of girls and women are usually sex-role stereotyped.[59] Further, a correlation has been shown between attending a women's college and achieving success. At least one study has shown that women's college graduates earn higher test scores, are more likely to attend graduate school, and receive higher salaries than female graduates of coed colleges.[60] More specifically, thirteen of the fifty-four female members of the 103rd Congress and one third of the women board members of the 1992 Fortune 1000 companies were graduates of women's colleges.[61] These are impressive numbers,

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in Denton, Texas, and Douglass College in New Brunswick, New Jersey. It is unclear how Mississippi University for Women should be categorized; it is a public college which currently limits its male students to twenty percent of the total student body, and its curriculum is focused upon women's issues. It is often referred to as the third remaining public women's college in the country. Sarah C. Campbell, *Its Life in Limbo, MUW still looks the survivor to ambitious women,* COMMERCIAL APPEAL, Sept. 25, 1994, at 1B. Clearly, the outcomes of the VMI and Citadel cases, which deal specifically with the issue of the constitutionality of public single-sex colleges, will directly affect the future of public women's colleges. However, this note will focus upon the effect which these decisions may have upon the eighty-one private women's colleges which remain in the United States.

54. *See, e.g.*, Ellen Goodman, *Schools Should Forgo Tax Dollars If They Wish to Discriminate,* CHI. TRIB., May 31, 1994, at 17.

55. Brian S. Yablonski, Note, *Marching to the Beat of a Different Drummer: The Case of the Virginia Military Institute,* 47 UNIV. MIAMI L. REV. 1449, 1483 (1993).

56. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

57. *See, e.g.*, MARY F. BELENKY ET AL., WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND (1986), and DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (1991).

58. Thomas R. McDaniel, *The Education of Alice and Dorothy: Helping Girls to Thrive in School,* CLEARING HOUSE, Sept. 1994, at 43.

59. *Id.*

60. Estrich, *supra* note 40, at 39.

61. Patricia Beard, *The Fall and Rise of the Seven Sisters,* TOWN & COUNTRY MONTHLY, Nov. 1994,

considering that only four percent of female college graduates attended women's colleges.[62]

Also, many of our country's modern female role models attended women's colleges.[63] Several of these prominent, successful women have publicly stated their belief that their success was rooted in an all-female college education. For example, Susan Estrich, a professor of law and political science at the University of Southern California and a graduate of Wellesley College, recently wrote:

> I was actually miserable a good deal of the time I was [at Wellesley], particularly during the long winters when the janitor was the only man around. But what I learned was worth it. I spent the better part of four years in a world in which women could do anything, because no one told us we couldn't. I even took some math courses. By senior year, somehow, I'd become an accomplished test-taker. When I got to Harvard Law School, where men vastly outnumbered women and sexism was the rule, a professor told me on the first day that women didn't do very well. I laughed and decided to prove he was wrong. That's a Wellesley education.[64]

First Lady Hillary Rodham Clinton, also a graduate of Wellesley, has said:

> Wellesley was very, very important to me and I am so grateful that I had the chance to go to college at a place where women were valued and nurtured and encouraged and where we didn't seem odd at all that we wanted to do whatever it was that we thought best for our lives.[65]

Although the past several years have led to a growing awareness of the possible benefits of single-sex education, most women's colleges were unable to survive long enough to enjoy this new popularity. In 1960, there were 298 women's colleges,[66] but financial trouble caused by decreasing applications led to the close or the coeducation of more than two thirds of them in a period of thirty-five years; today, only eighty-four women's colleges remain.[67] After many years of uncertainty, most of these remaining women's colleges are experiencing a substantial increase in applications and enrollment during the 1990's.[68] Many attribute this sudden popularity to the growing opinion that women are "shortchanged" in coeducational settings, the statistical success of women's

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at 159.

62. Estrich, *supra* note 40, at 39.

63. For example, columnist and author Anna Quindlen, Barnard, Class of 1974; playwright Wendy Wasserstein, Mount Holyoke, Class of 1971; feminist author Susan Faludi, Radcliffe, Class of 1981; author and activist Gloria Steinem, Smith, Class of 1956; actor Meryl Streep, Vassar, Class of 1971; news anchor Diane Sawyer, Wellesley, Class of 1967. Beard, *supra* note 61, at 159.

64. Estrich, *supra* note 40, at 39.

65. *Frontline: Hillary's Class* (PBS television broadcast, Nov. 15, 1994).

66. Susan Tifft, *Dollars, Scholars and Gender; Must Women's Colleges Like Mills Either Go Coed or Go Under?*, TIME, May 21, 1990, at 85.

67. Linda Chavez, *Dare call it 'diversity'?*, DENV. POST, June 5, 1994, at D6.

68. Maria Newman, *Women's Schools See Resurgence; Harassment Concerns, Hillary Factor Cited*, DALLAS MORNING NEWS, Jan. 23, 1994, at 1A.

college graduates, and "the Hillary factor"—the success of Hillary Rodham Clinton and other famous women's college graduates.[69]

Mills College, in Oakland, California, is perhaps the clearest example of society's growing support for women's colleges. "Better dead than co-ed" was the battle cry of Mills women in 1990, when the administration announced its decision to admit men, after 138 years of admitting only women.[70] The trustees of Mills had made this unpopular decision out of financial necessity; there were too few students to support the college's budget. Apparently, two major trends of the eighties affected Mills—a shrinking pool of applicants because of the "baby bust" of the late 1960's and 1970's, and the declining popularity of women's colleges.[71] Mills students blockaded buildings, boycotted classes and even shaved their heads in protest, until alumnae pledged to contribute several million dollars to the college and the administration backed down.[72] Several years later, enrollment has increased and the college is on stronger financial ground.[73] If it is true, as many people argue, that attending a women's college gives a young woman self-esteem, confidence and "the nerve to speak up,"[74] and that these qualities lead directly to the successful careers that many women's college graduates experience, then the end of public and private single-sex education could make a very serious, lasting impact on the professional success of women in this country.

How then, when feminists acknowledge the numerous benefits that single-sex education has for women, do they justify their fight to deny men the same experience? Certainly, men receive similar benefits by attending a single-sex college.[75] Harvard sociologist David Reisman, in his testimony as an expert in the Citadel case, stated that in an all-male environment, men are freer to express their "gentler side."[76] The presence of women may inhibit that sense of freedom. Also, there is the close bond that Citadel cadets form with each other because of their stressful environment and complete lack of privacy (they even share stall-less showers and toilets).[77] The college handbook states: "These classmates are your sole source of support and aid at this time. They will be your friends for life."[78] Again, the admission of women would alter this part of the Citadel experience. Many argue that feminists want it both ways. As one editorialist has written: "Though [feminists] see the advantages of single-sex education, they do not want those advantages extended to males. To me it is clear: Feminists don't want a level playing

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69. *Id.* Since 1991, the number of applications received by the eighty-four women's colleges has increased fourteen percent, and total enrollment has reached 98,000, up from 82,500 in 1981. *Id.*

70. Tifft, *supra* note 66, at 85.

71. *Id.*

72. Newman, *supra* note 68, at 1A.

73. Sandra Reeves, *A Burst of Popularity*, U.S. NEWS & WORLD REPORT, Sept. 26, 1994, at 105, 108.

74. *Id.* at 105 (quoting Cokie Roberts, a 1964 graduate of Wellesley College).

75. Only four all-male colleges remain in the United States today. Two are public: The Citadel and VMI, and two are private: Hampden-Sydney College in Farmville, Virginia and Wabash College in Crawfordsville, Indiana.

76. Katha Pollitt, *Subject to Debate; Single Sex Education*, NATION, Aug. 22, 1994, at 190.

77. Faludi, *supra* note 2, at 64.

78. Manegold, *supra* note 36, at 58.

field—they want a head start."[79]

However, many supporters of private women's colleges argue that because of their "private" status, they are not subject to the Equal Protection Clause, which provides that only a "state" may not discriminate. Private individuals and organizations may discriminate, as long as they are not acting "under color of state law" or on behalf of the state. So far, most courts have agreed with this argument; only a few have found that a private college has committed a "state action." The Citadel is a public college and is therefore clearly subject to the Equal Protection Clause. In a discussion of the public or private distinction, syndicated columnist Ellen Goodman recently wrote that "[t]axpayer money is going to an institution that prohibits any chance of access to Shannon Faulkner or half the population of South Carolina . . . . Women's colleges are private. The Citadel can save the males by rejecting public money."[80]

The "private" status of women's colleges may not protect them from future constitutional challenges because of the increasingly blurred distinction between "public" and "private." If a court characterizes the federal benefits which women's colleges receive as public funding, then it may find that "state action" exists, and therefore withhold these benefits from women's colleges because of their discriminatory admissions policy. Without the help of grants, tax-exempt status and student loan programs which the government provides them, most "private" colleges would be unable to survive.

The most recent legal challenge to the admissions policy of a private four-year liberal arts women's college occurred in 1980. In *Naranjo v. Alverno College*,[81] the plaintiff was denied admission to weekend nursing classes at Alverno College because of his gender. Alverno's policy was to admit only women to its degree granting programs.[82] Naranjo sued the college, claiming a violation of Title IX of the Education Amendments,[83] which prohibits discrimination in educational programs that receive federal financial assistance, and the Equal Protection Clause. The college's motion for summary judgment was granted.[84]

The court acknowledged that Alverno College received tax exempt status and leased land from the State of Wisconsin, and that Alverno students received state tuition grants and financial aid.[85] However, the court concluded that "allegations of governmental

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79. Roger Soiset, *Letter to the Editor*, ATLANTA J. & CONST., Sept. 13, 1994, at 7.

80. Goodman, *supra* note 54, at 17.

81. 487 F. Supp. 635 (E.D. Wis. 1980).

82. *Id.* at 636.

83. 20 U.S.C. § 1681(a) (1994). It is important to note that this statute, which was enacted in 1972, states specifically that "in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education and to public institutions of undergraduate higher education." 20 U.S.C. § 1681(a)(1). Certainly, a challenge to the admissions policies of the two remaining public women's colleges may be successful under Title IX because the statute clearly applies to public colleges. The statute language specifically excludes the admissions policies of private colleges from its regulation; however, due to the fading distinction between public and private, a private women's college may even fail under a Title IX challenge. *See* Janella Miller, Note, *The Future of Private Women's Colleges*, 7 HARV. WOMEN'S L.J. 153, 158-61 (1984).

84. *Naranjo*, 487 F. Supp. at 638.

85. *Id.* at 636.

funding and general regulation cannot support a finding of state action unless such ties to the state directly encourage the challenged activity."[86]

As for the Title IX argument, the court found that the admissions policies of private colleges are clearly not included within the language of the statute, which applies "only" to the admissions policies of "institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."[87] Therefore, the court found that Title IX regulation did not apply to Alverno College, which was not considered a "professional" institution although it offered a professional nursing degree in addition to its liberal arts program.[88]

The 1980 *Alverno* decision is an example of a court upholding the single-sex admissions policy of a private college simply because it was a private college. However, since 1980, there have been several cases, discussed below, that have changed the law in this area, and have made the *Alverno* decision less clear. Most believe that this issue will not be resolved until it reaches the Supreme Court. Legally and socially, this country continues to progress towards equality between the sexes in almost all areas. Today, or in the near future, it is very possible that *Alverno's* reasoning may be rejected.

One indication that today's courts and legislatures are more likely to apply public laws to private organizations is the recent push to enact and enforce laws which prohibit discrimination by private clubs. In about a dozen states and cities, private golf and country clubs may no longer discriminate on the basis of race or gender.[89] Most of these laws resemble a New York City statute, which defines a social club as a public organization if it has more than 400 members, provides regular meal service and receives funds from non-members for the furtherance of trade or business.[90] In 1988, the Supreme Court ruled that the New York City statute was constitutional on its face.[91]

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86. *Id.*

87. *Id.* at 637.

88. *Id.* at 638.

89. For example, Michigan, Ohio, Kansas, Florida, and New Orleans, Louisiana have enacted statutes similar to New York City's law. Marcia Chambers, *Opening 'Private' Clubs*, NAT'L L.J., June 13, 1994, at A21.

90. New York City's Human Rights Law of 1965 states that:

> [It is] an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin or sex of any person directly or indirectly, to refuse, [or to] withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof.

N.Y. CITY ADMIN. CODE § 8-107(2)(McKinney 1986). A 1984 amendment extends the Human Rights Law to any "institution, club or place of accommodation [that] has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." N.Y. CITY ADMIN. CODE § 8-102(9) (McKinney 1986).

91. New York State Club Ass'n. v. City of New York, 487 U.S. 1 (1988). In this case, the New York State Club Association sought a declaration that the 1984 amendment was unconstitutional on its face. The court stated that, strictly on its face, the law does not violate the First Amendment rights of club members. However, the Court, acknowledging that some clubs might have a legitimate case against the law, stated:

> It is conceivable, of course, that an association might be able to show that it is organized for specific

Anti-discrimination laws have not only been extended to the membership practices of private clubs, but also to discriminatory treatment of club members. For example, courts in Florida and Kansas have ordered two private country clubs to end their practice of allowing only men to golf during the prime Saturday morning tee times. Also, the Florida club was ordered to open its "Men's Grill", the club restaurant, to women.[92]

Some states have taken an even broader approach—New York State's anti-discrimination law applies to clubs which have more than 100 members,[93] and Michigan's law applies to all private clubs and service organizations, regardless of size.[94] This trend of prohibiting racial and gender discrimination in organizations which are more clearly "private" (in the sense that they receive no funding from the government) than private colleges, shows that the law may be leaning toward treating many more (and eventually, maybe all) so-called "private" organizations as public.

Also, it is noteworthy that VMI's "separate but equal" women's military-style program is being run at the private Mary Baldwin College. The recent decision of the Fourth Circuit Court of Appeals in *United States v. Virginia*,[95] which upheld this program as constitutional, seems to further erode the distinction between public and private.

In short, if a court were to find that a private women's college should be treated as a public institution due to the substantial government funds it receives, then it seems that the fate of the "Seven Sisters"[96] and the Citadel would be linked. For this reason, many feminists have found themselves in the ironic position of supporting the Citadel in its battle against Shannon Faulkner for the sake of protecting all single-sex education. This position is particularly difficult, considering the many articles written about the supposedly misogynistic atmosphere of the Citadel.[97] One writer reports that slang terms for women are commonplace; for example, cadets who show weakness are usually humiliated by being called "sluts," "whores," or "skirts."[98] In a recent *New Yorker* article, feminist author Susan Faludi describes the chants the cadets sing during their daily runs, which often include lyrics about "gouging out a woman's eyes, lopping off body parts, and

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purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.

Id. at 13.

92. Chambers, *supra* note 89, at A21.

93. *Today's News Update*, N.Y. L.J., July 12, 1994, at 1.

94. Chambers, *supra* note 89, at A21.

95. United States v. Virginia, 44 F.3d 1229 (4th Cir. 1995). *See supra* text accompanying notes 9-22.

96. The seven most prestigious women's colleges, all located on the east coast, are often referred to as the Seven Sisters (although one has gone coed). They are Barnard College in New York, New York, founded in 1889; Bryn Mawr College in Bryn Mawr, Pennsylvania, founded in 1885; Mount Holyoke College in South Hadley, Massachusetts, founded in 1837 (the oldest women's college in America); Radcliffe College in Cambridge, Massachusetts, founded in 1879 (Since 1942, Radcliffe women have attended classes with Harvard men; however, Radcliffe remains an all-female corporate institution separate from Harvard); Smith College, in Northampton, Massachusetts, founded in 1871; Vassar College in Poughkeepsie, New York, founded in 1861 (which has been coed since 1970); and Wellesley College, in Wellesley, Massachusetts, founded in 1875. For a discussion of the Seven Sisters, see Beard, *supra* note 61, at 159.

97. *See, e.g.*, Faludi, *supra* note 2, and Wingert, *supra* note 1.

98. Manegold, *supra* note 36, at 59.

evisceration."[99] Inevitably, during Faulkner's fight to enter the Citadel, the general anger towards women which seems to be fostered at the Citadel was channeled directly at her. The Citadel newspaper referred to her as "the divine bovine" and a popular T-shirt on campus depicted several male bulldogs (the Citadel's mascot) and one female bulldog in a red dress, with the caption, "1,952 Bulldogs and 1 Bitch."[100] This controversy presents a tough choice for feminists. Many have chosen to continue the battle that Shannon Faulkner started, hoping that the distinction between public and private will remain clear in the courtroom. Others, fearing that private women's colleges are linked to the Citadel's fate, haven chosen to support an institution which allegedly fosters contempt against women.

III. THE EQUAL PROTECTION CLAUSE

It is particularly difficult to predict the future application of the state action doctrine to private women's colleges because the Supreme Court has yet to develop a specific test to determine the existence of state action.[101] There are, however, several factors which the Court considers, including whether the private organization is engaged in a public function, whether the state has encouraged private activities, whether the government regulates the private entity, whether there is a symbiotic relationship between the government and the private entity, and whether the state provides funds to the private entity.[102] Because private women's colleges receive government funding, it is possible that the Court could find enough of a link between the states and the colleges to justify finding state action.

In *Grove City College v. Bell*, the Supreme Court found that a private college was subject to federal regulation because some of its students received federal tuition grants.[103] Grove City College refused all state and federal financial assistance in order to avoid federal regulation. However, many of its students received Basic Educational Opportunity Grants from the federal government.[104] Title IX of the Education Amendments of 1972 prohibits sex discrimination in "any education program or activity receiving Federal financial assistance."[105] Grove City College had not actually violated Title IX, but it did refuse to produce the required written assurance of compliance to the government. The Court concluded that the statute's language "contains no hint that Congress perceived a substantive difference between direct institutional assistance and aid received by a school through its students."[106] Therefore, the Court found that the tuition grants were "federal financial assistance" to Grove City College, and as a result, the college was forced to comply with Title IX. Although *Grove City College* did not involve the issue of a discriminatory admission policy, and it did not apply the Equal Protection Clause or the

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99. Faludi, *supra* note 2, at 72.
100. *Id.* at 79.
101. Yablonski, *supra* note 55, at 1482.
102. *Id.* at 1482-83.
103. 465 U.S. 555 (1984).
104. *Id.* at 559.
105. 20 U.S.C. § 1681(a) (1994). *See supra* note 83.
106. *Grove City College*, 465 U.S. at 564.

state action doctrine, it is significant to a discussion of this issue because of the court's reasoning. The Court classified student tuition grants as "federal financial assistance" in a Title IX case; therefore, similar reasoning may lead the court to find that state tuition grants also constitute state action.

In fact, there are at least a small number of cases in which courts have found state action in a private school. For example, *Norwood v. Harrison*[107] involved a Mississippi state program through which textbooks purchased by the state were loaned to students in public and private schools. When this case was brought before the Court, many of the private schools in Mississippi had racially discriminatory admissions policies of accepting only white students. In *Norwood*, the Supreme Court held that the textbook loaning program constituted state action because it was a form of "tangible aid" that supported racial discrimination.[108] The Court stated that "a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."[109] Interestingly, the Court also explained that: "Free textbooks, *like tuition grants directed to private school students,* are a form of financial assistance inuring to the benefit of the private schools themselves."[110] With this statement, the Court acknowledged that tuition grants may subject private schools to the Equal Protection Clause.

In an earlier case, *Hammond v. University of Tampa*,[111] the all-white admissions policy of the University of Tampa, a private university, was challenged. The Fifth Circuit Court of Appeals ruled that because the University used a surplus city building and leased other city land for school purposes, it was acting on behalf of the state, and was therefore subject to the Equal Protection Clause.[112]

In the most recent Supreme Court case dealing with the issue of "state action" and private colleges, *Rendell-Baker v. Kohn*,[113] the Court found that the discharge of teachers from a privately owned, publicly funded school was not state action. The New Perspectives School, which specialized in dealing with children with special needs, received at least ninety percent of its operating costs from state and federal agencies.[114] Despite this significant amount of public funding, the Court compared the private school to a private corporation that makes contracts to build roads or bridges for the government. "Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."[115]

The Court also emphasized that the government did not closely regulate the personnel matters of the school. This fact somewhat separated the government from the school's decision to fire certain teachers.[116] Justice Marshall, in his dissent, suggested that if the

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107. 413 U.S. 455 (1973).
108. *Id.* at 464-65.
109. *Id.* at 465.
110. *Id.* at 463-64 (emphasis added).
111. 344 F.2d 951 (5th Cir. 1965).
112. *Id.* at 951.
113. 457 U.S. 830 (1982).
114. *Id.* at 832.
115. *Id.* at 840-41.
116. *Id.* at 841-42.

action had been brought by students, rather than teachers, the Court would have been more likely to find state action.[117] So, although the Court did not find state action in this case, the Court's reasoning seems to support the idea that a publicly funded private school may be committing a state action if the action affects its students.

Since *Rendell-Baker*, there has been no Supreme Court decision on the issue of state action by a publicly funded private school. However, the three decisions previously discussed clearly show that the Court has the legal leeway to find that a private college has committed state action.

Some supporters of women's colleges—including the twenty-seven women's organizations which filed a joint amicus brief in the VMI case[118]—argue that even if the state action doctrine was applied to, for example, Smith College,[119] Smith would survive because unlike VMI, a women's college could satisfy the constitutional test laid out in the VMI case.[120] First, Smith could argue that the exclusion of men is necessary to accomplish its purpose of providing an effective leadership program for women. Smith could point to the studies which show the higher rates of career success among women's college graduates, and the incidence of classroom discrimination against girls and women in coed education.[121] The second prong—the presence of a governmental purpose—might be satisfied by arguing that the governmental purpose is a "compensatory" one—"to redress the effects of historic discrimination or disadvantage."[122]

However, due to the landmark case of *Mississippi University for Women v. Hogan*,[123] upon which the VMI court based much of its reasoning, these arguments would probably fail. Mississippi University for Women (MUW) was an all-female college, which included a nursing program. The plaintiff in this case, Joe Hogan, was a registered nurse who wished to pursue a baccalaureate degree in nursing. He was denied admission to MUW's program solely because of his gender. He was, however, offered the opportunity to audit nursing courses, but he could not enroll for credit.[124] The Court applied the two part test, which was subsequently applied in *VMI*, and also included a third prong:

> [The test] must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypical notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior,

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117. *Id.* at 851.

118. Stuart Taylor, Jr., *Standing Up For Single-Sex Education*, RECORDER, Oct. 13, 1994, at 8. The National Women's Law Center, the Women's Legal Defense Fund, the American Association of University Women, and The National Organization for Women were among the twenty-seven groups which filed this joint amicus brief. *Id.*

119. *See supra* note 96.

120. *Id.*

121. *See supra* notes 58-62 and accompanying text.

122. Taylor, *supra* note 118 (quoting amicus brief, citation omitted).

123. 458 U.S. 718 (1982).

124. *Id.* at 720-21.

the objective itself is illegitimate.[125]

MUW failed all three prongs of the Court's test. The Court's reasoning suggested that any women's college might fail the test. MUW argued that its "governmental objective" was to "compensate for discrimination against women" by performing a sort of "educational affirmative action."[126] The Court stated that a compensatory purpose which favors one sex can only be justified if it "intentionally and directly assists members of the sex that is disproportionately burdened."[127] For example, the Court stated that a federal statute allowing women a longer tenure in the military before mandatory discharge "directly compensated" for the fact that women are unable to serve in combat, and therefore have fewer chances for promotion within the military.[128] However, nursing is a profession that has historically been open to women, and MUW showed no evidence of discrimination against women in this particular field.[129] Applying the third prong of the constitutional test, the Court noted that the exclusion of men from a nursing school simply perpetuated the stereotype that nursing is a women's profession.[130] Therefore, the Court found this "benign, compensatory purpose" of redress for historical discrimination insufficient.[131]

A women's liberal arts or business college may succeed in arguing that it has a "compensatory purpose" because most professions (aside from nursing and teaching) have traditionally excluded women. Also, because women lack female role models and mentors,[132] they may find it more difficult to advance within many professions. In order to show that a single-sex education "directly remedies" this historical discrimination, it could also argue that graduates of women's colleges benefit from an alumnae network, by pointing to the studies which show that more women's college graduates succeed in their careers.[133] However, it is clear that these sexist attitudes are quickly changing. Currently, the majority of college students are women,[134] and generally, women receive higher grades than men.[135] It is possible that a modern Court would consider the purpose of women's colleges to be based on "archaic" stereotypes that women cannot succeed in a coed environment, and that women need a "head start" in order to compete with men. In this way, women's colleges may fail to satisfy the first and third prongs of the MUW test.

The Court decided that MUW failed the second prong of the test—that the gender classification is "substantially and directly related" to the proposed objective—because

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125. *Id.* at 724-25.

126. *Id.* at 727.

127. *Id.* at 728.

128. *Id.* at 728-29.

129. *Id.* at 729. The Court noted that in 1971, when MUW's School of Nursing enrolled its first class, almost ninety-eight percent of all employed registered nurses were women. *Id.*

130. *Id.*

131. *Id.* at 730.

132. Cynthia Tyson, *A Woman's Defense of All-Male VMI*, WASH. TIMES, Apr. 27, 1993, at F2.

133. *See supra* notes 63-65 and accompanying text.

134. Lisa Hoffman, *Numbers Game; Big Leaps and Baby Steps in March to Equality*, CHI. TRIB., May 17, 1992, at 1.

135. Gerald W. Bracey, *Sex, Math and SATs*, PHI DELTA KAPPAN, Jan. 1993, at 415.

men were allowed to audit courses at the nursing school.[136] The Court stated that this fact was inconsistent with MUW's argument that men's presence in the classroom would adversely affect the women's education. The effect on women would presumably be no different if the men were taking the courses for credit, since auditors are permitted to participate fully in the classes.[137]

Many women's colleges would probably fail to satisfy this prong for similar reasons. Wellesley College, for example, has an exchange program with Massachusetts Institute of Technology and Brandeis University, which allows male students to take Wellesley courses for credit.[138] Arguably, this program contradicts Wellesley's dedication to all-female education. Many other women's colleges have similar exchange programs.[139] Also, most women's colleges have a substantial number of male professors. For example, at Mount Holyoke, sixty percent of the tenured professors are men, and at Smith, sixty-nine percent are men.[140] Arguably, the presence of male professors in the classroom also contradicts the mission of a women's college. If a court were then to apply the *MUW* reasoning in a case against a women's college, the college may fail to satisfy the constitutional test for one or both of the foregoing reasons.

It is difficult to predict the outcome of the courts on this issue. However, due to society's continuous movement toward gender equality, it appears less likely women's colleges will survive.

IV. Tax Exempt Status

Currently, the very significant financial benefit of tax exempt status is granted to private women's colleges. Under the Internal Revenue Code (IRC) Section 501(c)(3), private colleges are exempt from paying income taxes because they are considered "corporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." Also, under IRC Section 170, financial contributions made to private women's colleges are deductible as "charitable contributions." This provision gives private women's colleges an additional financial benefit because it encourages taxpayers to contribute to the colleges in order to receive a tax deduction.

In 1982, the tax exempt status of Smith College was challenged on the theory that because its admissions policy was discriminatory, it should not be considered a "charitable institution." In that case, the court strictly applied the language of the IRC, finding that because Smith was an "educational institution," it was exempt from paying taxes.[141]

A year after *Smith College*, however, the Supreme Court decided *Bob Jones*

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136. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1980).

137. *Id.* at 731.

138. 84 Wellesley C. Bull. 64 (1994).

139. For example, the following women's colleges have course exchange programs with coed colleges: Barnard, with Columbia College; Bryn Mawr, with Haverford, Swarthmore and University of Pennsylvania; Mount Holyoke, with Amherst College and Hampshire College; Smith, with Amherst and Hampshire; Vassar, with Bard College. Beard, *supra* note 61, at 159.

140. Susan Pouncey, *Hers*, N.Y. Times, Mar. 17, 1988, at C2.

141. Trustees of Smith College v. Board of Assessors, 434 N.E.2d 182 (Mass. 1982).

University v. United States,[142] which appears to have made private women's colleges more vulnerable to losing their valuable tax exempt status. Bob Jones University is a private Christian college in Greenville, South Carolina. Because the University sponsors believed that interracial dating and marriage are contrary to the Bible's teachings, the University denied admission to applicants who were "engaged in an interracial marriage or known to advocate interracial marriage or dating." Unmarried African-Americans were allowed to enroll.[143]

The Court ruled that Bob Jones University was not entitled to tax exempt status because of its racially discriminatory admissions policy. The Court looked to the intent of Congress in creating the tax exempt statute, and decided that "entitlement to tax exemption depends on meeting certain common-law standards of charity -- namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."[144] Considering the plethora of congressional acts and Supreme Court decisions (beginning with *Brown v. Board of Education*[145]) that prohibited racial segregation in public education, the Court determined a racially discriminatory admissions policy to be "contrary to established public policy," and therefore, the Court revoked Bob Jones University's tax exempt status.[146]

In its decision, the Court did not indicate whether it would consider sex discrimination in education to be contrary to public policy. A week after the decision was announced, women's groups had already recognized that it might lead to denial of tax exemption for single-sex organizations and schools. An attorney for the Women's Legal Defense Fund stated that "[t]he Bob Jones reasoning could apply in all kinds of cases, especially in a society where the federal government provides the financial incentive of federal money in so many places."[147] It is certainly possible that in this age of increasing equal opportunity between the sexes, the Court could decide that women's colleges are in violation of public policy when they deny men educational options that are afforded only to women. While there exists no Equal Rights Amendment, the Court might find that the Equal Pay Act of 1963,[148] Title VII of the Civil Rights Act of 1964,[149] and various

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142. 461 U.S. 574 (1983).

143. *Id.* at 580.

144. *Id.* at 586.

145. 347 U.S. 483 (1954).

146. *Bob Jones*, 461 U.S. at 593.

147. Kathleen Sylvester, *Does the Bob Jones Case Have Wide Ramifications?*, NAT'L L. J., June 6, 1983, at 3.

148. The Equal Pay Act of 1963 states:

Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (I) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor than sex . . . .

other anti-discrimination acts are sufficient evidence of a national public policy against sex discrimination.[150]

In *Bob Jones*, the Court stated that the IRS has the authority to withdraw tax exempt status from an organization, "only where there is no doubt that the organization's activities violate fundamental public policy."[151] In 1977, the IRS issued an opinion letter, stating its position that "classification based on sex is not against declared Federal public policy and is educationally and socially beneficial to the community at large."[152] According to Section 6110 (J)(3) of the IRC, these letter rulings "may not be used or cited as precedent," so the IRS is not bound by its 1977 opinion. After almost twenty years of social change and a major shift towards equal treatment, the IRS's opinion may be ripe for change as well.

In summary, both the judiciary and the IRS have the power to deny tax exempt status to private women's colleges. Such a denial would severely affect a college's finances, and would likely lead to the demise or coeducation of many private women's colleges.

V. THE COMMERCE CLAUSE

The Commerce Clause of the Constitution provides that "Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States." [153] The drafters of the Constitution granted Congress this power in order to prevent the individual states from creating "a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad."[154] Notably, the Constitution fails to provide a clear definition of "commerce," leaving Congress with extremely broad power. But this power is not unchecked; over the years, many acts of congressional Commerce Clause regulation have been challenged, and some overruled, through the judicial system.

Despite the original purpose of the Commerce Clause, Congress has increasingly used

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29 U.S.C. § 206 (d)(1)(1988).

149. Title VII of the Civil Rights Act of 1964 states:

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1988).

150. Miller, *supra* note 83, at 164.

151. Bob Jones University v. United States, 461 U.S. 575, 598 (1983).

152. Tech. Adv. Mem. 7744007 (1977).

153. U.S. CONST. art. 1, § 8.

154. Gibbons v. Ogden, 22 U.S. 1, 15 (1824).

this power to regulate "social evils," such as child labor,[155] racial discrimination,[156] and gambling.[157] If a private women's college were found to be affecting interstate commerce, then perhaps Congress would choose to regulate the "social evil" of sex discrimination through the Commerce Clause.

In *Heart of Atlanta Motel, Inc. v. United States*,[158] the Supreme Court approved Congress' regulation of a motel which denied accommodations to African-Americans. Before making their decision to apply the Commerce Clause, Congress had heard testimony that this motel's discrimination had a significant effect on interstate travel by African-Americans for two reasons: first, it caused inconvenience and displeasure for the African-American traveler who was uncertain of finding lodging. Second, this uncertainty discouraged many African-Americans from travelling. The Court agreed that interstate travel was within the definition of commerce, and was therefore subject to regulation. "Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property."[159]

In this case, the Court defined the modern test for the constitutionality of Commerce Clause regulation: "The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate." If Congress has met both of these requirements, then the regulation is proper.[160]

One could argue that the operation of a private women's college constitutes interstate commerce because it enrolls students from many different states outside of its own. Students move from all over the country to live in a college town and support the local economy with out-of-state money. Congress and the Court might agree that sex discrimination by private women's colleges often affects commerce because, as discussed previously, many women's colleges are financially unstable as too few women apply for admission. The admission of men would lead to a greater pool of applicants from other states, more admitted students from other states and more financial resources within the school and within the school's local community. If Congress found that this argument was a "rational basis" for finding an effect on interstate commerce, then it might follow that abolishing sex discrimination by private colleges would be a "reasonable and appropriate" way to eliminate this detrimental effect. This is one way in which the Commerce Clause may be used in the future to regulate the admissions policies of single-sex private colleges.

In *Katzenbach v. McClung*,[161] the Supreme Court approved Congress' regulation of an Alabama restaurant which refused to serve African-Americans. Although the restaurant served mostly local patrons, it purchased approximately forty-six percent of the food it served from a local supplier who had purchased it from outside the state.[162] The hearings which Congress conducted on this matter led Congress to conclude that the restaurant's

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155. Hammer v. Dagenhart, 247 U.S. 251 (1918).

156. Boynton v. Virginia, 364 U.S. 454 (1960).

157. Lottery Case, 188 U.S. 321 (1903).

158. 379 U.S. 241 (1964).

159. *Id.* at 256 (quoting Hoke v. United States, 227 U.S. 308, 320 (1913)).

160. *Id.* at 258-59.

161. 379 U.S. 294 (1964).

162. *Id.* at 296.

discriminatory policy affected interstate commerce because "the fewer customers a restaurant enjoys the less food it sells and consequently the less it buys."[163] Further, as in *Heart of Atlanta Motel*, the court found that racial discrimination by restaurants discouraged African-Americans from traveling, thereby affecting interstate commerce.[164] The Court concluded that regulation was proper if the restaurant serves interstate travellers, or if a "substantial portion" of the food it serves has moved in interstate commerce.[165]

The reasoning of *McClung* could apply to a case challenging the admissions policies of single-sex colleges. Private women's colleges are not self-contained organizations. Presumably, a "substantial amount" of the bookstore supplies (including textbooks), dining hall food, and office furniture and supplies which are used by women's colleges, have moved in interstate commerce. Following the Court's reasoning in *McClung*, the college's refusal to admit men often leads to fewer students, which leads to fewer textbook purchases and dining hall meals, which unnecessarily restricts the amount of these products bought and sold in interstate commerce.

These cases show that Congress certainly has the power, through the Commerce Clause, to regulate the admissions policies of women's colleges, and that the Court would likely approve this regulation. As the *McClung* Court noted, "the power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere."[166]

CONCLUSION

Although Congress and the courts have not yet clearly shown a desire to put an end to private single-sex education, this Note argues that both have the power and the flexibility to do so, through the Equal Protection Clause, the tax-exempt status, and the Commerce Clause. As society progresses further and further towards gender equality in the workplace, in social organizations, and in education, it seems inevitable that the constitutionality of private women's colleges will become a major issue. Ironically, the feminist fight to admit Shannon Faulkner to the Citadel may bring that question to the forefront much sooner.

Many supporters of the Citadel, who may be unaware of the legal arguments involved, believe that a 152-year tradition simply should not be changed. One mother of two Citadel graduates recently stated, "It was built as a boys' school. It was always a boys' school and it always should be a boys' school."[167] Aware that tradition alone will not save the Citadel, Shannon Faulkner's mother has said, "Slavery was a tradition, too. Things change . . . ."[168] Others have already resigned themselves to the loss of single-sex education in all forms. As one columnist recently wrote, "for better or worse the future

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163. *Id.* at 299.
164. *Id.* at 300.
165. *Id.* at 304.
166. *Id.* at 305.
167. Manegold, *supra* note 4, at A10.
168. Pollitt, *supra* note 76, at 190.

is coed."[169]

Shannon Faulkner has bluntly told her critics to "[w]ake up and smell the '90's."[170] As this Note illustrates, it is clearly possible that this decade may bring an end to all single-sex education, public and private. Until this issue is resolved by the Supreme Court, the future is uncertain for the Citadel, and for private single-sex colleges as well. There is one certainty, however; as laws and emotions are passionately argued in South Carolina courtrooms and across the country, there is always the sense that no matter what the outcome, something valuable will be lost.

169. *Id.*

170. *Id.*

REGULATION OF CONSTRUCTION SITE STORMWATER RUNOFF: WE CAN DO BETTER THAN THIS

DAVID L. HATCHETT*

INTRODUCTION

Stormwater discharge from construction sites poses a challenging problem. Unlike the classic image of a ne'er-do-well corporate giant spewing toxic destruction through big smokestacks and metal pipes, stormwater discharge, a nonpoint source of pollution,[1] is not so easily vilified. We typically do not see black air or thick sludge from construction site stormwater runoff, but that does not mean it is not a serious environmental threat. Whether an activity contributes to the adulteration of our natural resources does not depend upon the image of that pollution mechanism. The impact on the environment can still be significant. The question of what to regulate is not what we can easily see; rather, the question is whether our natural resources are being degraded. Proof of that degradation from nonpoint sources such as construction site stormwater runoff abounds.[2]

Our streams, lakes, and rivers are not as healthy as they could be, and the most disheartening aspect of that pollution is that at least some of the sources could be controlled rather easily.[3] One important origin of nonpoint source pollution is sediment from construction sites.[4] Sedimentation of harbors, rivers, lakes, and streams can preclude usage of our natural resources.[5] Further, clogged waterways exact a societal cost in the form of flood damage and the resulting cleanup.[6]

This Note addresses the concerns of regulating stormwater discharges "associated with industrial activities" within the meaning of the Clean Water Act (CWA),[7] with particular emphasis on the regulation of construction sites. The CWA's main objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's

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1. The EPA has never formally defined "nonpoint source," but one author suggests that a nonpoint source is: "1. [g]enerated by diffused land use activities . . . 2. [c]onveyed to waterways through natural process such as storm runoff or ground water seepage, rather than be [sic] deliberate, controlled discharge, and 3. [n]ot susceptible to 'end-of-pipe' treatment." Richard A. March et al., *Nonpoint Source Water Pollution and Section 208 Planning: Legal and Institutional Issues*, 1981-1982 AGRIC. L. J. 324, 333.

2. *See infra* Part I.

3. *See infra* Part IV.B.

4. One study indicates that erosion sediment is the primary source of nonpoint source pollution, and construction activities contribute the most sediment pollution per acre. Dean T. Massey, *Land Use Regulatory Power of Conservation Districts in the Midwestern States for Controlling Nonpoint Source Pollutants*, 33 DRAKE L. REV. 35, 38-39 (1983-1984).

5. *See generally* OFFICE OF WATER, U.S. ENVTL. PROTECTION AGENCY, EPA No. 841-R 94-001, NATIONAL WATER QUALITY INVENTORY: 1992 REPORT TO CONGRESS (March 1994) [hereinafter NATIONAL WATER QUALITY INVENTORY] (states' assessments of water quality within their borders).

6. *See infra* notes 21-23 and accompanying text.

7. 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993). For a discussion of the meaning of "associated with industrial activities," see *infra* notes 60-66 and accompanying text.

waters."[8] The current regulatory framework is not, however, accomplishing this objective and a change is needed to correct the focus of the stormwater program.

Part I of this Note discusses the negative impacts of sedimentation on water quality. Part II provides an overview of the federal regulatory attempts in response to congressional initiatives regarding water pollution legislation. Part III illustrates the various state approaches to regulation of construction site stormwater. Part IV proposes significant changes to the current regulatory framework. Finally, this Note concludes by offering some recommendations on how the stormwater program can successfully address nonpoint source pollution from construction sites. Specifically, Congress needs to rekindle the notion of state-run water pollution control programs that rely heavily on local regulation. The current federal program regulations are inadequate and ignore the local nature of sediment discharges. Mandatory state frameworks incorporating local ordinances can remedy the shortcomings of the current system.

I. How Sedimentation Degrades Our Waters

Although nonpoint source pollution is currently the leading cause of water quality degradation in the United States,[9] its the impact was poorly understood until fairly recently.[10] Nonpoint pollution is less obvious, and the corresponding sense of urgency may be lacking because of the image differences. Unlike point source effluent, where a discrete discharge can be identified, nonpoint source pollution is not so easily recognized. The transport mechanism that conveys point source pollution—a pipe—is replaced in nonpoint pollution by natural processes like rainfall. Point sources are more easily identified and regulated by end-of-pipe technologies.[11]

When legislators formulated the 1972 CWA, some believed that regulation of point sources alone would be sufficient to protect our nation's waters from pollution.[12] As more point source regulation was promulgated, however, the quality of water was not

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8. 33 U.S.C. § 1251(a) (1988). The primary goal is generally stated as restoring and maintaining fishable, swimmable waters. *See, e.g.*, A. Myrick Freeman III, *Water Pollution Policy*, *in* Public Policies For Environmental Protection 97, 106 (Paul R. Portney ed., 1990).

9. 57 Fed. Reg. 41,344, at 41,344 (1992).

10. R. C. Loehr, *Characteristics and Comparative Magnitude of Nonpoint Sources*, 1974 J. Water Pollution Control Fed'n 45, 46 (1974).

11. Robert D. Fentress, Comment, *Nonpoint Source Pollution, Groundwater, and the 1987 Water Quality Act: Section 208 Revisited?*, 19 Envtl. L. 807, 813-14 (1989).

12. *See* Leonard Shabman & J. Walter Milon, *Economic Perspectives on Nonpoint Source Pollution: New Directions for Federal Policy*, *in* The Off-Site Costs of Soil Erosion 81, 83 (Thomas E. Waddell ed., 1985). However, evidence showing the nonpoint source impact on water quality did exist before the 1972 Act was implemented, but policy-makers chose not to legislate controls for nonpoint sources. *See* Freeman, *supra* note 8, at 109.

necessarily improving.[13] In fact, some waters worsened.[14] The federal government soon realized that the very purpose of the water pollution control legislation would not be achieved without addressing nonpoint sources.[15]

Nonpoint source pollution from erosion is unique in that, unlike many point sources, the transport of the pollutants tends to occur in peak flows.[16] Heavy rainfall or melting snow can carry appreciable concentrations of pollutants by running over construction sites and other industrial activities.[17] The effect of erosion is felt both on-site, through the loss of productive soils, and off-site, by degrading water quality, impairing biological communities, silting streams, and causing localized flooding.[18] This Note, however, focuses on policy answers to the impact caused by construction site sediment transported off-site.

The impacts from erosion and sediment are fairly well-known. Degraded water quality affects many natural and man-made processes.[19] The costs to society are indeed great: One scientist estimates that the costs of off-site damages are over $7 billion per year.[20] The effects are felt in many different areas, both economically and aesthetically. The direct economic impacts of sedimentation include water storage losses, flooding, dredging costs, water treatment and use, and damage to fisheries.[21] Water-based recreation also suffers damage from sedimentation, including both direct economic and aesthetic losses due to destruction of fish habitat, siltation of recreational facilities, and eutrophication of waterways.[22] Additionally, the quality of our drinking water is

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13. Without point source control, however, water quality may have drastically worsened because of more complex, more concentrated pollutants entering bodies of water. Freeman, *supra* note 8, at 120. Unfortunately, there is no way to meaningfully measure in what condition our waters would be if point source control had not taken place. *Id.*

14. *Id.* at 118.

15. *Id.* at 141.

16. *Id.* at 140.

17. *Id.*

18. Peter C. Meyers, *Off-Site Effects of Soil Erosion: What We Can Do*, *in* THE OFF-SITE COSTS OF SOIL EROSION 103, 104 (Thomas E. Waddell ed., 1985).

19. In terms of natural impacts, over eighty percent of all waters are degraded by sediment-laden runoff to the extent of impairing fish communities. Edward T. LaRoe, *Instream Impacts of Soil Erosion on Fish and Wildlife*, *in* THE OFF-SITE COSTS OF SOIL EROSION 171, 175 (Thomas E. Waddell ed., 1985). Erosion also distributes toxins throughout our environment; for instance, DDT, a pesticide now banned in the United States, was spread in large part by sediment transport. *Id.* at 174. Impacts on man-made processes are discussed *infra* notes 21-26 and accompanying text.

20. Marc O. Ribaudo, *Regional Estimates of Off-Site Damages From Soil Erosion*, *in* THE OFF-SITE COSTS OF SOIL EROSION 29, 45-46 (Thomas E. Waddell ed., 1985). Another scientist estimated costs may be as high as $13 billion per year. Edwin H. Clark II, *National Estimates of the Off-Site Damages of Erosion*, *in* THE OFF-SITE COSTS OF SOIL EROSION 15, 17 (Thomas E. Waddell ed., 1985).

21. Damages in 1983-adjusted dollars per year are estimated at: $1.1 billion for loss of water storage capacity; almost $900 million each for flooding and dredging; over $1.2 billion for water treatment and use by cities and industries; and over $400 million for fisheries. Ribaudo, *supra* note 20, at 35-44.

22. The economic and aesthetic water recreation losses are estimated in 1983 dollars at $1.9 billion nationwide, with $534 million for the Corn Belt region alone. *Id.* at 31-33. It is interesting to note that the Corn

threatened by nonpoint sources as chemicals typically adsorb to sediment particles that are in turn carried to local rivers and reservoirs.[23]

The existence of some economic impact is widely accepted, but the quantification of damages is problematic.[24] The loss of aesthetic value is difficult to determine because the valuation relies heavily on individual assessments of value.[25] A similar difficulty is the depreciation of property values due to the degradation of water quality. While some of the damage from erosion and sedimentation may not be easily quantifiable, it is widely accepted within the environmental and legislative communities that significant damage does in fact occur.[26]

Studies have shown the impact of degradation by determining the percentage of use impairment for rivers, lakes, and estuaries caused by each form of nonpoint source pollution.[27] Nonpoint pollution is considered the largest contributor to the degradation of all three of these water resources, and the individual impact of construction sites is significant.[28] The most alarming fact in construction site erosion damage is that a relatively small percentage of land mass is disturbed for construction purposes at any given time, yet its contribution to water quality degradation is far greater than other sources on a per acre basis.[29]

The bottom line is that our water resources are being degraded despite existing control programs. Nonpoint source pollution must be more meaningfully addressed in order to improve water quality and meet the CWA's express goals. In particular, the pollution attributed to construction sites must be better regulated.[30] Significant damage has occurred and will continue to occur unless a better regulatory framework is implemented.

II. Overview of Federal Regulatory Attempts

A. Previous Legislation

The federal stormwater program evolved from water pollution control legislation

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Belt suffers the most water-based recreation damage, yet at least one state in that region is lax in its erosion and sediment control. *See infra* text accompanying notes 94-105.

23. LaRoe, *supra* note 19, at 173.

24. *See supra* note 5. For an argument proposing increased property values by thoughtfully planned stormwater management techniques, see J. Toby Tourbier, *Open Space Through Stormwater Management: Helping to Structure Growth on the Urban Fringe*, 49 J. Soil & Water Conservation 14, 17 (1994).

25. For a discussion of the benefits and liabilities of contingent valuation, see generally Charles J. Cicchetti & Neil Peck, *Assessing Natural Resource Damages: The Case Against Contingent Value Survey Methods,* Nat. Resources & Env't, Spring 1989, at 6 (many studies have utilized contingent valuation to estimate societal costs, but many limiting factors detract from the estimate's credibility).

26. *See* Clark, *supra* note 20, at 26.

27. National Water Quality Inventory, *supra* note 5, at 5.

28. 55 Fed. Reg. 47,990, at 47,991 (1990).

29. Massey, *supra* note 4, at 39.

30. The reasoning for why construction site runoff is the best choice on which to build a model regulatory framework is discussed *infra* Part IV.B.

dating back to 1899.[31] The Refuse Act of 1899, often considered the first legislation to address water pollution, protected navigable waters from unauthorized discharges.[32] Later, the Federal Water Pollution Control Act of 1948 (FWPCA), which was subsequently amended and called the CWA,[33] authorized research and investigation of water pollution problems, but this Act withheld from government the authority to establish water quality standards, control discharges, or engage in enforcement activities.[34] While the original FWPCA provided little more than a federal funding mechanism for municipal wastewater treatment facilities,[35] its amendments made it the centerpiece of water quality legislation.

The Water Quality Act of 1965[36] was the first step toward mandating state action in water pollution control policy.[37] States were to set water quality-based standards, determine allowable pollutant discharges, and enforce the penalties for noncompliance.[38] The lawmakers apparently realized that state control of water pollution was the best option, but their efforts failed because water quality-based guidelines were unwieldy, enforcement tools were ill-defined, and states differed widely in their commitment and ability to enforce the standards.[39]

In 1972, Congress sought to remedy the failures of the 1965 Act by adopting technology-based guidelines and restoring power to the federal government.[40] The 1972 amendments[41] via section 208 specifically addressed nonpoint sources as an important

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31. The Refuse Act of 1899, although primarily aimed at keeping channels from becoming unnavigable, tangentially improved water quality via bans on dumping in public waters. *See* 33 U.S.C. § 407 (1988). *See also* FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 338-39 (1984). The Act made it unlawful "to throw, discharge, or deposit . . . refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state," unless the discharger had a permit from the Secretary of the Army. 33 U.S.C. § 407 (1988).

32. 33 U.S.C. § 407 (1988). Over time, the normal meaning of "navigable" was altered as Congress utilized existing terms and phrases to regulate for a different purpose—to protect water quality, not navigability. *See* Quivira Mining Co. v. United States EPA, 765 F.2d 126, 130 (10th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). The *Quivira Mining* court interpreted the CWA "to cover, as much as possible, all waters of the United States instead of just some," and to regulate to the fullest extent possible under the commerce clause. *Id.* at 129-30. The result was a distortion of the meaning of "navigable" to include nearly all waters that may eventually connect to a navigable water, even small brooks and arroyos that are usually dry. *Id.* at 130.

33. Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993)). The 1972 amendments brought with them the "CWA" name tag. *See infra* notes 40-46 and accompanying text. Congressional authority to regulate water pollution under the CWA was upheld as a viable exercise of power under the commerce clause and protection of health and welfare in United States v. Ashland Oil & Trans. Co., 504 F.2d 1317, 1328-29 (6th Cir. 1974).

34. Freeman, *supra* note 8, at 99.

35. ANDERSON ET AL., *supra* note 31, at 339-40.

36. Pub. L. No. 89-234, 79 Stat. 903 (repealed 1972).

37. Freeman, *supra* note 8, at 99.

38. *Id.* at 102.

39. *Id.* at 102-03.

40. *Id.* at 103.

41. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816

factor in degrading water quality.[42] Unfortunately, section 208 offered little in the way of progress because it was not accompanied by nonpoint program requirements.[43] The new provision, a voluntary program, asked the states to formulate waste treatment management programs that identified nonpoint sources of pollution.[44] It also suggested that states draft regulatory procedures to control those pollution sources via land use planning tools.[45] Section 208 has since been abandoned and is no longer used,[46] but it did provide a stepping stone for future nonpoint source program improvement.

B. The Water Quality Act of 1987

Congress realized that section 208 was insufficient to handle nonpoint pollution problems and responded with the Water Quality Act of 1987 (WQA).[47] With this Act, a new goal was added to the CWA: "[I]t is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of [the CWA] to be met through the control of both point and nonpoint sources of pollution."[48] Two new sections—section 319[49] and section 402(p)[50]—were also created in part to shore up the inefficiencies of section 208's waste management plans.

From section 319 a two-pronged state-based framework for nonpoint source regulation began to develop.[51] This legislation called for: (1) state assessment of current water quality throughout each state, and (2) state management plans aimed at preventing further degradation.[52] The first prong required present water quality studies nationwide and provided an informational foundation for addressing nonpoint pollution.[53] The states were required to assess both waters in need of some action to curb nonpoint pollution and nonpoint sources that were significantly contributing to the degradation of those waters.[54] Section 319's second prong purported to build state and local-based regulatory

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(codified as amended at 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993)).

42. 33 U.S.C. § 1288 (1988).

43. Fentress, *supra* note 11, at 818-19.

44. 33 U.S.C. § 1288(a) & (b) (1988).

45. *Id.* § 1288(b). For discussions of harnessing land use planning to solve nonpoint pollution, see generally Philip S. Sussler, *Trends in Water Quality Regulation: The Greening of Land Use Practices and Controls*, 37 BOSTON B. J. 5 (1993), and Daniel R. Mandelker, *Controlling Nonpoint Source Water Pollution: Can It Be Done?*, 65 CHI.-KENT L. REV. 479 (1989).

46. Funding was cut off in 1980. J. A. Jurgens, *Agricultural Nonpoint Source Pollution: A Proposed Strategy To Regulate Adverse Impacts*, 2 J. LAND USE & ENVTL. L. 195, 201 (1986).

47. Pub. L. No. 100-4, 101 Stat. 7 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993)).

48. 33 U.S.C. § 1251(a)(7) (1988).

49. *Id.* § 1329.

50. *Id.* § 1342(p).

51. *Id.* § 1329(a) & (b).

52. *Id.*

53. *Id.* § 1329(a)(1)(C) & (D).

54. *Id.* § 1329(a)(1)(A) & (B).

frameworks for controlling specific nonpoint sources.[55] The federal government also made funds available via section 205, a provision created to finance the state requirements for nonpoint source programs.[56]

In creating section 319, the federal government suggested that states are at least the best choice to study nonpoint pollution, if not the cornerstone on which to build the new nonpoint source regulatory framework. However, requiring the states to only formulate a plan made little sense unless specific regulatory programs were to be implemented in the future. The legislators thus dropped the ball by requiring only formulation of the management plan and leaving the critical detail of implementation to each state's discretion.[57]

Section 402(p), the WQA's other salient addition, did offer some mandatory regulation of nonpoint sources, but it was based on national—not state—administration.[58] Section 402(p) enabled the National Pollutant Discharge Elimination System (NPDES) permitting process to be applied to stormwater discharges.[59] The new stormwater permitting program adapted the NPDES permits, originally designed to regulate point sources, to runoff discharges "associated with industrial activity."[60] Construction site operations disturbing greater than five acres were included in the definition.[61]

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55. *Id.* § 1329(b)(2).

56. *Id.* § 1329(h). To help implement state programs, Congress authorized $400 million for four years. *Id.* § 1329(j). However, only a fraction was appropriated. *See, e.g.,* H.R. REP. No. 297, 101st Cong., 1st Sess. 29 (1989).

57. Fentress, *supra* note 11, at 825. Congress did give some control to the EPA via plan review and approval. *Id.* at 824. Section 319 monies are doled out according to EPA approval of the projects implemented, but only 60% of the cost can be federally funded. *Id* at 824-25.

58. 33 U.S.C. § 1342(p) (1988 & Supp. V 1993). NPDES authority is delegated to states willing to run the program, but the administration responsibilities are federal in nature. *See infra* notes 82-84 and accompanying text.

59. 33 U.S.C. § 1342 (p) (1988 & Supp. V 1993).

60. *Id.* § 1342(p)(2)(B). Currently the permits are required for eleven categories of industrial activity: (l) facilities subject to stormwater effluent guidelines, new source performance standards, or toxic pollutant effluent standards; (ii) certain lumber, paper, chemicals, petroleum, leather, concrete, metal, and ship building facilities; (iii) certain mining and oil and gas extraction facilities; (iv) hazardous waste treatment, storage, and disposal activities; (v) landfills, land application sites, and open dumps receiving industrial waste; (vi) recycling facilities for metal, batteries, auto parts, and other materials; (vii) steam electric power generating facilities; (viii) certain transportation facilities; (ix) sewage treatment works; (x) construction activities unless operations disturb less than five acres which are not part of a larger common plan or development for sale; and (xi) certain food, tobacco, textile, furniture, paper, printing, drugs, paints, plastics, glass, machinery, electrical, warehousing, and other facilities. 1 OFFICE OF WATER, U.S. ENVTL. PROTECTION AGENCY, EPA No. 833 F-93-002, NPDES STORM WATER PROGRAM: QUESTION AND ANSWER DOCUMENT 1-17 (March 1992) [hereinafter EPA QUESTION & ANSWER DOCUMENT]. For exact classifications of each regulated industry see 40 C.F.R. § 122.26 (1994). Originally only 10 categories were promulgated, but a Ninth Circuit Court opinion modified the tenth category by striking down the five-acre limit and added the eleventh category. Natural Resources Defense Council (NRDC) v. United States EPA, 966 F.2d 1292, 1304-06 (9th Cir. 1992). The case is discussed more fully *infra* notes 62-66 and accompanying text.

61. EPA QUESTION & ANSWER DOCUMENT, *supra* note 60, at 15. The five-acre minimum size will likely

The recent Ninth Circuit decision, *NRDC v. United States EPA*, however, altered Section 402(p)'s guidelines for defining what is to be regulated under industrial activity.[62] The five-acre minimum size for regulating construction site runoff [63] was invalidated by the Natural Resources Defense Council's (NRDC) challenge because the EPA had based its acreage limit on administrative concerns instead of legitimate environmental concerns.[64] Until further promulgation, however, the EPA has stated that it will not require permits for construction operations under five acres.[65] The court also invalidated the EPA's exclusion of certain light industries from regulation unless stormwater comes in contact with equipment or other materials, thereby creating an additional category for regulation.[66]

Category (x) of the NPDES permitting system for construction activities is the primary concern of this Note. The EPA has promulgated rules for obtaining permits for this particular industrial activity.[67] For all industrial activities three types of permits are available: individual, group, and general.[68] The general permit is favored by both industry and the regulating agencies due to its simple application requirements and lessened administrative burden.[69] Because of these qualities, the general permit is the

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be changed soon. *See infra* note 65.

62. *NRDC*, 966 F.2d at 1309-10.

63. *See supra* note 60 for a definition of category (x).

64. *NRDC*, 966 F.2d at 1306. The standard for overturning an agency decision is whether the action was arbitrary or capricious. 5 U.S.C. § 706(2)(A) (1994). The EPA admitted in the Federal Register that even small sites can cause significant impacts if left unregulated, yet they set the five-acre limit to decrease the number of permits to be processed. 55 Fed. Reg. 47,990, at 48,033 (1990). Because the EPA's only reason was administrative burden, the court held the decision was arbitrary and must be invalidated. *NRDC*, 966 F.2d at 1305-06.

65. The existing regulations are called "Phase I" of the stormwater program. *See* OFFICE OF WATER, U.S. ENVTL. PROTECTION AGENCY, EPA No. 833-E-93-001, STORM WATER GENERAL PERMITS BRIEFING 23 (Sept. 1992) [hereinafter EPA GENERAL PERMITS BRIEFING]. The next step will be "Phase II," or, alternatively, an elimination of Phase II requirements and expansion of Phase I. *Id.* at 27. When the new regulations are implemented, a new construction site acreage limit should be set. *Id.* at 28.

66. The court ruled the EPA's exemption was arbitrary because, unlike other industrial activities, the companies in the light industry class were excluded on the basis of whether they were likely to be discharging pollutants, not on whether they fit a certain industrial definition. *NRDC*, 966 F.2d at 1304-05. Category (xi) is discussed *supra* note 60.

67. 40 C.F.R. § 122.26 (1994). The EPA plans to continue promulgating by creating Phase II or expanding Phase I of the stormwater program. EPA GENERAL PERMITS BRIEFING, *supra* note 65, at 27-28. The second phase may change the statutory exemptions of Phase I by considering regulation of all municipalities, additional industrial activities, commercial activities like dry cleaning and gas stations, large parking lots, residential property, recreational areas, additional livestock facilities, and greenhouses and nurseries. *Id.* at 29.

68. For information on the individual and group permits, *see generally* OFFICE OF WATER, U.S. ENVTL. PROTECTION AGENCY, EPA No. 833-F-93-001, OVERVIEW OF THE STORM WATER PROGRAM (March 1993) [hereinafter EPA OVERVIEW OF THE STORM WATER PROGRAM] (provides requirements for compliance).

69. *See* EPA GENERAL PERMITS BRIEFING, *supra* note 65, at 5. A general permit, or permit-by-rule, sets standardized requirements for compliance; no site-specific requirements are added to the basic form. EPA OVERVIEW OF THE STORM WATER PROGRAM, *supra* note 68, at 3.

overwhelming choice for construction activities.[70]

Contractors may obtain a general permit when they comply with the standard requirements called a Notice of Intent (NOI).[71] A fundamental requirement of the NOI is a promise by the contractor to follow the regulations concerning stormwater discharges.[72] The NOI must be sent to the EPA at least two days before construction begins.[73] In addition to the NOI, the contractor is responsible for preparing a pollution prevention plan that is kept on-site and is available to the agency upon demand.[74] The plan, which includes a list of sediment control measures called best management practices (BMPs),[75] is the most important requirement of a general permit because the plan must be "tailored to the site specific conditions, and designed with the goal to control the amounts of pollutants in stormwater discharges from the site."[76] Once these two steps are taken, the contractor has a permit to discharge into the nation's waters.[77] The federal stormwater NPDES permitting system, however, does not require sampling or inspections, and lacks any enforcement actions, sanctions, reprimands, or critical review of the permit application process.[78] In sum, this federal program provides no impetus to substantively comply because there is no fear of repercussions.

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70. Individual permits also apply, but the construction site requirements are very similar to the general permit and the application deadline is tougher to meet; thus, operators choose the general permit form. EPA OVERVIEW OF THE STORM WATER PROGRAM, *supra* note 68, at I-2, V-1. The group permit does not apply because construction projects are not usually grouped together. *See id.* at 3.

71. The NOI for construction activities must contain: (1) street address or latitude and longitude; (2) name, address, and telephone number of the operator(s) and status as federal, state, private, public or other entity; (3) permit numbers of any existing NPDES permits; (4) name of the receiving waters; (5) indication of whether any available quantitative data describing the pollutant concentrations in the discharges is available; (6) estimated start and completion dates and number of acres disturbed; and (7) certification that a stormwater pollution prevention plan has been prepared for the site. *Id.* at V-1. NOIs are handled somewhat differently according to the agency handling the permits. *See infra* notes 82-83. This discussion is referring to the federal requirements.

72. EPA OVERVIEW OF THE STORM WATER PROGRAM, *supra* note 68, at V-1.

73. *Id.*

74. The pollution prevention plan must include: (1) a description of the nature of the construction activity; (2) a sequence of major construction activities; (3) estimated total area of the site and area to be disturbed; (4) estimated runoff coefficient after the construction is complete; (5) any existing data on the quality of stormwater discharges and the soil types of the site; (6) name of the receiving water; (7) and a site map indicating drainage and slopes after completion, areas of soil disturbance, outline of the area to be disturbed, location of stabilization measures and controls, and surface waters at discharge points. *Id.* at V-1. For more detailed information and sample plans see generally OFFICE OF WATER, U.S. ENVTL. PROTECTION AGENCY, EPA No. 832 R-92-005, STORM WATER MANAGEMENT FOR CONSTRUCTION ACTIVITIES: DEVELOPING POLLUTION PREVENTION PLANS AND BEST MANAGEMENT PRACTICES (Sept. 1992) [hereinafter EPA CONSTRUCTION POLLUTION PREVENTION PLANS AND BEST MANAGEMENT PRACTICES].

75. BMPs are methods, measures, or practices that help control nonpoint pollution. 40 C.F.R. § 130.2 (1994). Structural or nonstructural controls and operation or maintenance procedures all can be BMPs. *Id.*

76. EPA OVERVIEW OF THE STORM WATER PROGRAM, *supra* note 68, at V-1.

77. *Id.*

78. *See, e.g.*, Esther Bartfeld, *Point-Nonpoint Source Trading: Looking Beyond Potential Cost Savings*, 23 ENVTL. L. 43, 63 (1993).

Throughout the federal legislative attempts, Congress has acknowledged the importance of state involvement,[79] yet states' exclusive responsibilities have been taken away each time they were granted. The 1965 WQA, which failed because of ill-devised quality-based standards, gave states control only to have it removed by future legislation.[80] In addition, the 1987 WQA's section 319 was aimed at giving states control, but the legislation did not require the states to implement management programs.[81] In both cases, the legislations' requirements are to blame for the failures, yet Congress has never required nonpoint programs exclusively at the state level.

III. States' Approaches To Regulation Of Construction Sites

A. Failure of Most State Programs

Independent of the current EPA regulations for construction site stormwater discharges, every state has discretion in adopting additional measures for regulating stormwater runoff. States with primacy are required to administer the NPDES program and can also adopt state measures.[82] States without primacy cannot administer the NPDES permitting system[83] and the EPA-run program, which offers little enforcement of the federal mandate, controls the administration of the NPDES system in those states.[84] Even in some state-created programs, no substantive inspection or enforcement exists to ensure compliance, thus frustrating the entire purpose of stormwater regulation.[85]

Several of the NPDES-authorized states attempted to model their permits after the federal regulations instead of creating an additional, independent system, only to appear disorganized and ill-informed because of the long delays and confusion in federal permit promulgation.[86] If states then depended solely on the EPA as a model for their state programs, the resulting regulation—fraught with uncertainties—became merely a burden to both the regulating agencies and the regulated industries. Resources were wasted by

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79. *See generally* Metropolitan Sanitary Dist. v. United States Steel Corp., 332 N.E.2d 426, 432 (Ill. App. Ct. 1975), *cert. denied*, 424 U.S. 976 (1976) (the CWA shows the continuing intention of Congress to encourage municipalities and states to regulate water pollution).

80. *See supra* text accompanying notes 36-39.

81. *See supra* text accompanying notes 47-61.

82. Currently 38 states have primacy—the federal agency's delegation of authority to a state for regulating a substantive area. *See infra* note 83 for a list of states without primacy. The authority to delegate primacy is found in 33 U.S.C. § 1342(a)(5) & (b) (1988).

83. 12 states—Alaska, Arizona, Florida, Idaho, Louisiana, Maine, Massachusetts, New Hampshire, New Mexico, Oklahoma, South Dakota, and Texas—and the District of Columbia are lacking primacy at this time. *See* 57 Fed. Reg. 41,176, at 41,176 (1992); 57 Fed. Reg. 44,412, at 44,412 (1992).

84. *See supra* note 83.

85. *See infra* notes 92-105 and accompanying text.

86. *See, e.g.*, *Many May Miss Permit Deadline for Storm Water Runoff, Analysts Say*, Daily Rep. for Exec. (BNA) No. 172, at D-22 (Sept. 3, 1992). After numerous delays, the EPA promulgated the final NPDES stormwater general permits for construction sites and other industrial activities less than three weeks before compliance was required, giving industry a very short time to acquaint itself with the regulations and compile the information necessary to complete a pollution prevention plan and file a Notice of Intent. *Id.*

government and industry alike. The end result was punishment for businesses responsible enough to follow permit application recommendations and discouragement for states willing to have primacy but lacking regulation separate from the NPDES system.[87]

Some of the blame, however, can be attributed to state disorganization. Many state programs do not coordinate their efforts with an echelon of local government regulation.[88] Local efforts may not be encouraged by the state, and the local activities that do occur often go unnoticed.[89] The state, meanwhile, tries to administer its own stormwater programs without any assistance from the governmental units most familiar with the actual construction activities—the counties and municipalities.[90]

For states that do not have a successful stormwater permitting program one commonality exists—a lack of funding.[91] The federal appropriations for the stormwater management programs are insufficient to accomplish meaningful, effective regulation of nonpoint source pollutants—the leading cause of water quality degradation[92]—and states often cannot find enough funding to finance their own stormwater program.[93] One example of a state with poor organization in its stormwater program is Indiana.

Before the federal promulgation in 1990, Indiana had no stormwater requirements and had developed little expertise in managing construction sites.[94] Indiana has primacy,[95] and it set forth a statute with clear administrative regulations in response to the federal mandate.[96] The statute is modeled after the EPA system of NOIs and the five-acre minimum size.[97] Unfortunately, Indiana's construction site regulations have had little or

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87. *See, e.g.*, Bradford S. White, *Michigan's Storm Water General Permit Has Been Issued*, MICH. LAW. WKLY., at 5 (May 30, 1994). Michigan waited for general permits to be issued by the EPA instead of formulating its own. Some responsible companies tried to comply early by submitting group or individual permits, only to be told to resubmit for a general permit closer to the deadline. *Id.*

88. Indiana is a prime example. *See infra* notes 91-105 and accompanying text.

89. *See infra* text accompanying note 100.

90. The reasoning for why local entities are the most appropriate regulatory choices is discussed *infra* Part IV.C.1.

91. *See generally* 1 DEPT. OF CIVIL ENGINEERING - N.C. STATE UNIV. & DEPT. OF CITY AND REGIONAL PLANNING, UNIV. OF N.C. AT CHAPEL HILL, EVALUATION OF THE NORTH CAROLINA EROSION AND SEDIMENTATION CONTROL PROGRAM VIII-5 to VIII-11 (1990) [hereinafter NORTH CAROLINA STUDY].

92. *See supra* note 8 and accompanying text. The little funding available is for § 319 only; money is not appropriated for administration of § 402. Greg Lindsey, *Managing Implementation of Environmental Programs: The Case of Erosion and Sediment Control*, 18 PUBLIC PRODUCTIVITY & MGMT. REV. 247, 251 (1995).

93. Funding options are discussed *infra* Part IV.C.3.

94. An interesting aside is that the Indiana Department of Natural Resources does have expertise in construction operations, but that agency does not have control of the stormwater program, evidencing Indiana's internal disorganization. Lindsey, *supra* note 92, at 254.

95. Indiana did, however, plan on returning responsibilities for NPDES permits to the EPA in 1993 because of fiscal problems. Kyle Niederpruem, *More Funds Sought for Pollution Regulation*, THE INDIANAPOLIS STAR, Aug. 12, 1993, at B1. Thus, the commitment of the responsible agency, Indiana Department of Environmental Management, to the NPDES program during this period is questionable.

96. IND. ADMIN. CODE tit. 327, r. 15-5-1 to 15-5-11(Supp. 1995).

97. *See id.* r. 15-5-1.

no impact on sediment control.[98] Funding sources were not available when the state program was created.[99] The state permit program did not take advantage of existing local programs or encourage additional local efforts.[100] Currently, the Indiana Department of Environmental Management (IDEM) has no real educational tools for informing the regulated community.[101] Also, the submitted sediment control plans are rarely reviewed for their adequacy.[102] There is no formal inspection program set up at the state level, and enforcement has been nonexistent.[103] As a result, construction sites are not effectively regulated, bringing into question whether compliance is actually taking place.[104] In this type of state regulatory environment the stormwater regulation is little more than a burden for the agency and industry alike.[105]

B. Maryland's Erosion and Sediment Control Regulations

A few states do, however, have effective stormwater management programs for construction site runoff. Those states do not rely exclusively on the federal framework; they instead have an independent statutory framework with strong enforcement mechanisms.[106] Of the success stories Maryland is arguably the best model for

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98. *See* Lindsey, *supra* note 92, at 255-56. A good case study that exemplifies Indiana's failures is found in CENTER FOR URBAN POLICY AND THE ENVIRONMENT, INDIANA UNIVERSITY, MAKING EROSION CONTROL WORK: A CASE STUDY IN ENFORCEMENT (1994) [hereinafter CASE STUDY] (developer allowed to move stream, neglect stabilization of the site for over a year, and defy state regulations).

99. A new funding mechanism subsequently has been passed. Lindsey, *supra* note 92, at 255-56.

100. *Id.* at 255.

101. When construction site sediment controls are installed, the types of BMPs chosen often are not the best choices for preventing pollution, demonstrating that contractor training is lacking. For instance, the most commonly used BMPs, which capture sediment after it has been eroded, are less effective than the erosion-reducing BMPs which mitigate sediment transport in the first place. *See id.* at 259.

102. *See id.* at 255-56.

103. IDEM has not imposed any penalties. *Id.* at 256. IDEM's only enforcement actions taken are notices of noncompliance with no follow-up procedures to ensure compliance. *See, e.g.,* CASE STUDY, *supra* note 98, at 23.

104. *See* Lindsey, *supra* note 92, at 256. Perhaps better regulation is not pursued because the general public perceives no problem with water quality. Sadly, people often expect brown water with impaired biological communities, primarily because they have not seen the clean water comparison in their lifetimes. For an example of degradation significant enough to spark action, see generally James T. B. Tripp & Michael Oppenheimer, *Restoration of the Chesapeake Bay: A Multi-State Institutional Challenge*, 47 MD. L. REV. 425 (1988) (Virginia, Maryland, the District of Columbia, and Pennsylvania trying to save this critical resource).

105. A North Carolina study placed state programs into three categories according to their structure and corresponding probability of success. NORTH CAROLINA STUDY, *supra* note 91, at VIII-1 to VIII-3. Indiana is in the bottom tier of programs. *Id.* at VIII-3. For a more complete view of the categories and a detailed description of North Carolina's strong program, see *id.* at VIII-1 to VIII-11.

106. Florida, Maryland, North Carolina, Virginia, and Pennsylvania, considered the strongest programs, all have independent regulations. NORTH CAROLINA STUDY, *supra* note 91, at VIII-3. For a discussion of certain management criteria that demonstrate a successful administrative program, see Lindsey, *supra* note 92, at 247-50.

implementing a complete program.[107] Maryland's strong legislation dates back to 1970[108]—seventeen years before the Water Quality Act was passed.[109] Maryland's program emphasizes local regulation of sediment discharges. The local programs are mandatory, but a locality's authority to manage a program will return to the state's regulatory agency, the Department of the Environment's Water Management Administration (WMA), if the local efforts are too lax.[110] The state reviews the history of enforcement and the quality of sediment control plans approved by a locality in determining whether the authority will remain delegated.[111] The state does not, however, merely criticize the local efforts; it seeks to improve the regulation's effectiveness, and periodic delegation review is simply a constructive approach to strengthen the overall program.[112] Unlike the federal general permit system, Maryland requires contractors to submit and obtain approval for a site-specific sediment control plan.[113] The plans, which are reviewed by the local soil conservation district, county agency, or the WMA, clear the way for the needed building or grading permit.[114] Over 18,000 permits were issued in Maryland during 1993.[115]

In terms of enforcement tools, fines are common reminders of Maryland's sincerity in protecting its water resources. The criminal provisions allow for fines up to $5,000 and one year imprisonment for each day of violation, and civil sanctions are also available.[116] In 1993, for instance, Maryland's noncomplying parties suffered over one half million dollars in fines.[117] Maryland dedicated these monetary penalties to (1) correcting the operator's failure to implement and maintain sediment controls, and (2) administrative costs of the sediment control program.[118]

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107. The regulations are found in MD. CODE ANN., ENVIR. §§ 4-101 to 4-215 (1993 & Supp. 1994). Other states have effective programs, but Maryland is one of the oldest and most-accomplished. *See* NORTH CAROLINA STUDY, *supra* note 91, at VIII-3.

108. Only temporary controls were in place until 1982. OFFICE OF WATER, U.S. ENVTL. PROTECTION AGENCY, EPA No. 833-F-94-001, SUMMARIES OF 104(B)(3) GRANTS: MARYLAND MODEL CONSTRUCTION GENERAL PERMIT 1 (April 1994) [hereinafter MARYLAND MODEL PERMIT].

109. *See supra* note 47.

110. MD. CODE ANN., ENVIR. §§ 4-103, 4-202 (1993 & Supp. 1994).

111. *Id.* §§ 4-103, 4-206.

112. WATER MGMT. ADMIN., MARYLAND DEPT. OF THE ENV'T, EROSION AND SEDIMENT CONTROL ENFORCEMENT AUTHORITY DELEGATION CRITERIA 1 (1993) [hereinafter EROSION AND SEDIMENT CONTROL ENFORCEMENT].

113. MD. CODE ANN., ENVIR. § 4-103 (1993 & Supp. 1994).

114. *Id.* Note that Maryland's system actually reviews site-specific information, whereas the federal system reviews only the standardized NOI. *See supra* notes 71-78 and accompanying text.

115. MARYLAND DEPT. OF THE ENV'T, STATE AND LOCAL EROSION AND SEDIMENT CONTROL INSPECTION AND ENFORCEMENT DATA 1 (1993) [hereinafter INSPECTION AND ENFORCEMENT DATA].

116. MD. CODE ANN., ENVIR. §§ 4-116, 4-215 (1993). The federal penalty provisions under the CWA theoretically allow for even tougher penalties: for negligent violations, up to $25,000 for each day and one year imprisonment and for knowing violations, up to $50,000 for each day and three years imprisonment. 33 U.S.C. § 1319 (1988 & Supp. V 1993).

117. INSPECTION AND ENFORCEMENT DATA, *supra* note 115, at 1.

118. *See* MD. CODE ANN., ENVIR. § 4-116(c)(4) (1993 & Supp. 1994).

The structure of Maryland's program allows for a three-tier system of penalty provisions. Where the locality has received delegated authority, the local ordinance can have its own fine structure subject to the state's maximum amounts.[119] Therefore, local, state, or federal penalty provisions can be utilized, although usage of more than one would be limited to the most egregious violations.[120] For situations where the state has not delegated its authority, only two levels of provisions would be available—state and federal.[121]

Maryland also has other enforcement tools available that can be used at any time in the enforcement process. Notices of violations are used to inform parties of noncompliance.[122] If reasonable corrections are not made, a stop work order can be issued.[123] Bond forfeiture, withholding of additional sediment plan approvals, property liens, and withholding of use and occupancy of the land are all tools that can be applied to an enforcement action.[124] The contractor may even be required to mitigate the environmental impact of its failed sediment control agreement if deemed necessary by the inspector.[125] The Maryland legislature made explicit reference to the need for effective, adaptive enforcement mechanisms in order to achieve the statute's purpose,[126] and it followed through by enabling all of these tools.

Maryland's successful commitment to regulation of sediment discharges is also demonstrated by its large staff of state and local inspectors. In 1993 alone, over 120 inspectors, employed solely to enforce the sediment and erosion control law, conducted in excess of 130,000 inspections.[127] Inspections take place an average of once every two weeks, thus ensuring the proper BMPs are maintained throughout the construction process.[128] The inspectors are given the authority to enter the premises whenever necessary and have the discretion to require improved methods of erosion control if

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119. EROSION AND SEDIMENT CONTROL ENFORCEMENT, *supra* note 112, at 1.

120. In Maryland, for instance, the locality or state could use enforcement tools against the violator. MD. CODE ANN., ENVIR. §§ 4-116, 4-215 (1993). In addition, federal provisions could be available because the violation of the state regulations may also constitute a separate federal NPDES permit violation. 33 U.S.C. § 1319 (1988 & Supp. V 1993).

121. The enforcement options would be under the state and federal statutes, but the locality would have no provisions without an ordinance. *See* MD. CODE ANN., ENVIR. § 4-103(e) (1993 & Supp. 1994).

122. *Id.* §§ 4-109, 4-209.

123. *Id.* § 4-110.

124. INSPECTION AND ENFORCEMENT DATA, *supra* note 115, at 2.

125. *Id.*

126. MD. CODE ANN., ENVIR. § 4-101 (1993). The statute reads:

> Because of the great potential for harm to the waters of the state if soil erosion and sediment control measures are not properly implemented and maintained and because of the cumulative effect on the environment of violations whether the project creating the violations is large or small, it is necessary for the protection of the waters of [Maryland] to provide procedures for obtaining immediate compliance with the law, when violations occur.

127. INSPECTION AND ENFORCEMENT DATA, *supra* note 115, at 1.

128. EROSION AND SEDIMENT CONTROL ENFORCEMENT, *supra* note 112, at 2. Other areas with less inspections cannot ensure that controls are maintained after installation. *See, e.g.*, Lindsey, *supra* note 92, at 259.

current efforts are insufficient.[129] Further, the system incorporates a certain level of flexibility by allowing changes to the site's sediment control plan provisions when better or more cost-efficient control devices are available.[130] Also, inspection is done in light of three different stages within the construction process; pre-development, construction, and post-construction phases are all regulated to ensure that major sediment loss does not occur simply because the actual construction is not currently taking place.[131] The three-stage approach recognizes that erosion before and after the building process can be just as devastating.[132] To that end, the inspection system pays close attention to sediment control throughout the process until the plot of land is permanently revegetated or stabilized.

A key element in the Maryland program's success is its inclusion of most earth-disturbing projects. The program has only four exemptions from regulation: (1) agricultural land management practices and structures, (2) single family residences on two or more acres of land where the total disturbed area is less than one-half acre, (3) clearing or grading that disturbs less than 5,000 square feet and less than 100 cubic yards of earth, and (4) clearing or grading which is subject to state approval under state law.[133] The size cutoff of 5,000 square feet, or less than one-eighth acre, casts a fairly wide net to include most activities.[134] Maryland's approach is to regulate both small and large disturbances alike, although the methods used to control sediment often differ according to the size of disturbance.[135] The program reflects the idea that even small sites can discharge significant amounts of sediment if left unchecked.[136] The result is regulation of any site that can emit significant quantities of sediment, thus controlling stormwater runoff pollution from construction sites.

IV. Changing The Current Structure Of Regulatory Programs

A. Balancing Regulation of Point and Nonpoint Sources

Point source regulation via the technology-based NPDES permitting system has existed since the 1972 amendments.[137] The regulations in that arena of pollution control have had ample time to develop into a relatively strong, demanding framework.[138] Controls are precisely spelled out and tailored to specific industrial classifications.[139] The

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129. Erosion and Sediment Control Enforcement, *supra* note 112, at 3.

130. *Id.*

131. *See* Inspection and Enforcement Data, *supra* note 115, at 2.

132. *Id.*

133. Erosion and Sediment Control Enforcement, *supra* note 112, at 1.

134. Compare Maryland's one-eighth acre minimum to the EPA five-acre limit originally set. *See supra* note 60 and accompanying text.

135. *See generally* EPA Construction Pollution Prevention Plans and Best Management Practices, *supra* note 74 (describing different BMPs and their use limitations, including size of site).

136. *See also* 55 Fed. Reg. 47,990, at 47,992 (1990).

137. *See supra* note 42 and accompanying text.

138. *See* Shabman & Milon, *supra* note 12, at 82-83.

139. *See* 40 C.F.R. app. D, § 122 (1994).

NPDES point source permits are often individual permits with site-specific information and require routine reporting in order to remain in compliance.[140] In fact, the point source requirements may have gone too far in relation to the overlooked nonpoint source program.

A significant amount of water pollution is attributable to nonpoint sources, yet the regulatory framework shows little reflection of that fact.[141] The cost-efficiency of requiring point source controls is lessened relative to the potential impact of nonpoint source controls; each additional dollar spent on point sources is a relatively inefficient use of the money.[142] A better approach may be to ease some point source controls while greatly strengthening nonpoint controls.[143] However, in watersheds where point sources are not significant polluters tradeoffs between point and nonpoint sources are not available to solve pollution problems. An alternative proposal would be to continue adding nonpoint controls without compromising existing point source control programs.[144] Regardless of the approach taken, increased attention to nonpoint pollution is fundamental to improving water quality.

B. Relative Ease of Regulating Sediment from Construction Sites

Sediment pollution from construction sites is one of the easiest forms of pollution to control. Removal of sediment is relatively simple and the costs are reasonable. Unlike diffuse runoff from industrial plants, where chemical contaminants are often carried into surface and possibly groundwater,[145] pollution from construction sites is more easily removed. Removal of chemical pollutants from industrial plant runoff may require complex techniques and training in place of the simpler construction site BMPs.[146] For construction the primary concern is particle transport, not chemical transport,[147] and sediment removal is relatively easy compared to chemical removal. BMP effectiveness for construction site sediment control is questionable only to the extent that the site operator does not properly select, install, and maintain the control devices.[148]

The interaction of surface water with groundwater—a dilemma prevalent in controlling many pollutants—is also minimized when sediment is the main concern. Nonpoint pollution policy-makers struggle with the dynamic interactions between surface

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140. *Id.* § 123.45.

141. Shabman & Milon, *supra* note 12, at 83-84.

142. Freeman, *supra* note 8, at 142 & n.60.

143. For a detailed discussion on point-nonpoint source trading, a new idea to provide for nonpoint regulation while lessening regulation of point sources, see Bartfeld, *supra* note 78.

144. *See* Shabman & Milon, *supra* note 12, at 87-91.

145. *See* Fentress, *supra* note 11, at 835.

146. *See* OFFICE OF WATER, U.S. ENVTL. PROTECTION AGENCY, EPA No. 832 R-92-006, STORM WATER MANAGEMENT FOR INDUSTRIAL ACTIVITIES: DEVELOPING POLLUTION PREVENTION PLANS AND BEST MANAGEMENT PRACTICES 4-32 to 4-36 (Sept. 1992) [hereinafter EPA INDUSTRIAL POLLUTION PREVENTION PLANS AND BEST MANAGEMENT PRACTICES].

147. *See* EPA CONSTRUCTION POLLUTION PREVENTION PLANS AND BEST MANAGEMENT PRACTICES, *supra* note 74, at 1-3.

148. *Id.* at 5-4.

water and the water table when the surface water runoff contains substantial chemical pollutants. In such a case, improving surface water quality may actually degrade groundwater quality.[149] Groundwater recharge from a detention pond to the water table can cause contamination if the collected surface water runoff contains substantial chemical pollutants.[150] The pollutants are stopped from entering a stream or lake, but the pollutant may now penetrate the groundwater by infiltrating the soils above the water table.[151] A policy consideration then arises: Which priority prevails, protection of groundwater or surface water?[152]

With sediment the groundwater recharge aspect of the problem is minimal. Except for any chemicals adsorbed to particulate in the runoff, the materials retained by structural BMPs on construction sites will not significantly affect the water table via recharge or infiltration.[153] In fact, construction sites utilizing permanent structural BMPs may benefit groundwater by providing for increased recharge rates compared to similarly developed parcels of land without structural BMPs.[154] Thus, the policy tradeoff does not occur with control of construction site sediment.

Removal of sediment is typically less costly than removal of other nonpoint source pollutants. Many sediment pollution situations can be remedied by fairly inexpensive control devices. Seeding, mulching, sodding, and leaving buffer zones of vegetation are examples of low-cost BMPs.[155] On the other hand, sophisticated devices for chemical removal of pollutants can be very costly.[156] The relatively low cost of preventing sediment pollution means that construction projects will not be unfairly burdened to the point of economic infeasibility. For the few situations where these BMPs would be too costly, the stormwater regulations could act as a means for preventing projects where the utility of the land use is outweighed by the social cost of pollution and its corresponding cost of prevention.[157]

Because nonpoint source sediment control regulations for construction sites do not significantly affect groundwater issues and are less costly than other regulations,

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149. Mandelker, *supra* note 45, at 485.

150. *Id.*

151. *Id.*

152. *Id.* at 485-86.

153. The adsorbed chemicals could pose a problem if present in high concentrations. *See* EPA CONSTRUCTION POLLUTION PREVENTION PLANS AND BEST MANAGEMENT PRACTICES, *supra* note 74, at 4-4 to 4-6. However, good housekeeping BMPs could remedy that concern. *Id.* at 4-3.

154. The increased impervious area associated with finalized construction prevents water from infiltrating the surface and replenishing groundwater. *See* Tourbier, *supra* note 24, at 16. Structural BMPs that facilitate recharge help compensate for the loss of pervious area. *Id.* at 19.

155. EPA CONSTRUCTION POLLUTION PREVENTION PLANS AND BEST MANAGEMENT PRACTICES, *supra* note 74, at 3-12 to 3-25.

156. EPA INDUSTRIAL POLLUTION PREVENTION PLANS AND BEST MANAGEMENT PRACTICES, *supra* note 146, at 4-32 to 4-36.

157. The costs of pollution are always present, but regulating the pollution can internalize at least some of the costs; thus, society bears a lower cost because the contractor is paying for what would otherwise be externalized. For a discussion on internalizing costs, see JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 52-57 (1st ed. 1983).

formulation and implementation of an effective regulatory plan is relatively simple. In addition, building a framework for construction site runoff regulation cannot wait for a system addressing all forms of nonpoint source pollution. Complete regulation of all nonpoint sources will take exhaustive efforts to become a reality. Conversely, regulation of construction site discharges is a definable problem that can be addressed separately from the entire nonpoint regulatory framework. Regulation of construction sites should be pursued and implemented now, instead of waiting for further developments in other nonpoint programs.[158] Also, agencies need a successful model to foster respect from the regulated community and to create a workable prototype for other regulation. When the focus shifts to other nonpoint programs, the sediment control regulations could be incorporated into a larger framework, thus serving both the environmental and governmental needs for effective regulation of sediment pollutants.

C. Framework for Implementing Changes

1. Short-term Program.—In regulating sediment discharges from construction sites, both short and long-term solutions should be implemented to provide steady and deliberate growth. The short-term goals should raise awareness and provide experience, while the long-term solution should ensure that the CWA's objectives are attained.

In the short-term, the federal role should include legislating change to the current stormwater system. The current federal NPDES system should be kept only as a potential enforcement tool, with efforts otherwise focusing away from the current permit system. Section 402(p) should strip down the general permit to its barest form—a contractor's promise to comply. Also, the original NOIs and pollution prevention plans should not be required unless the states and localities specifically mandate the information in them.

Without the section 402(p) administrative requirements, the EPA and NPDES-authorized states could then shift their efforts to mandating section 319-like goals of state and local control and ensuring compliance with new state and local regulations. A new section 319 legislative provision mandating state statutes could lay a foundation on which to build an effective, independent solution.[159] Also, the state statutes could embody tailored stormwater programs that fit the individualized needs of the geographic characteristics of different localities.

Although many states may initially choose to enact relatively weak legislation, any formal effort would raise awareness and demonstrate increased sincerity of the state in addressing this pollution problem. Statutes should require site-specific information review, routine inspection provisions, and strong yet flexible enforcement tools.[160] The state, in turn, should also encourage local ordinances from its cities and counties.[161]

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158. The Phase II creation or Phase I expansion is intended to address many different areas, including many commercial activities and municipal separate storm sewers in smaller cities. EPA GENERAL PERMITS BRIEFING, *supra* note 65, at 30.

159. *See supra* Part III.B.

160. *See supra* Part III.B.

161. *See* Peter H. Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 STAN. ENVTL. L.J. 50, 53-55 (1993). For a counterargument asserting that private landowners often fall prey to overzealous local government regulation, see Sally Burgin, *Local Governments Taking Charge Of Water Quality—Is It a Good*

For many local governments, the enactment of local measures requires little encouragement. Often local units of government prefer to handle local matters without state or federal intervention, provided adequate funding is available.[162] A local sediment control ordinance could afford this opportunity. Also, because local governments are creatures of the state and derive most of their powers from the state, their dependence on budget allocations could encourage them to follow the state's recommendations for enacting local ordinances.[163] Once a statute is in place, the state's role in the short term would be to provide technical support and training for construction contractors and local governments in formulating and implementing their local sediment controls.

Focusing on the local governmental level of construction regulation is the ideal choice for many reasons. First, the land use aspect of the construction regulation lends merit to treating this issue as a local matter.[164] Land use questions have always been local issues, and the federal government is hesitant to step in and change that local power.[165] Second, questions tied to land use suit the expertise of local government. The strength of local government lies in its understanding of its constituency's needs and concerns. Local government officials, unlike those at other levels, regularly interact with and provide services for their populations. Therefore, they are generally better informed on matters that directly impact their constituency.[166] For societal problems such as pollution, the public's reaction is more closely viewed by local governments.[167] Because little insulation exists between the constituency and the local policy-makers, the regulatory response may be less tempered and more reflective of real public concerns.[168]

For many pollution problems, including sediment loading, the impact is at least partially felt by the population where the pollution occurs.[169] The constituents' vested interests in the quality of their immediate environment should dictate local construction regulation. Local government officials are geared toward serving as experts on what takes place locally; intricate political structure, physical land and water characteristics, and growth and development trends are noticed on a local scale.[170] Conversely, state knowledge of local dynamics would probably have to be supplied by the local government, and federal awareness would be even further removed without active, local efforts to inform the federal agencies.[171] Local government is simply better suited to observe and respond to matters in its own backyard; even the EPA realized this when it

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Idea?, NAT. RESOURCES & ENV'T, Spring 1991, at 19, 59.

162. *See infra* Part IV.C.3.

163. *See* Lehner, *supra* note 161, at 52-53.

164. *See* Mandelker, *supra* note 45, at 486.

165. Fentress, *supra* note 11, at 814.

166. Lehner, *supra* note 161, at 54-55.

167. *Id.*

168. *Id.* A common criticism of local government is the little insulation between the municipality and local industry, particularly when one company is a major employer. *Id.* at 53. Local industry can be a strong lobby, so other levels of regulatory oversight should be available. *See infra* text accompanying notes 194-99.

169. Lehner, *supra* note 161, at 55.

170. *Id.*

171. *Id.* at 58-59.

acknowledged that local control of the stormwater program would be the best choice.[172]

A prime example of the local nature of sediment control is the soil conservation district system. Soil conservation district engineers are equipped with personal knowledge of the historical, current, and future trends of an area.[173] District engineers know of individual sites where the land is disturbed and have more than a contour map to determine what impact the site runoff and sediment loading will impart.[174]

National control by Congress may not be the optimal choice because current national point source controls are often seen as too rigid and inefficient.[175] Construction site runoff, because of its local nature, may not respond well to a similar structure. Local government is better qualified to decide tradeoffs between point and nonpoint source regulatory programs.[176] Also, local regulation now may mean less federally enforced regulation in the future.[177] Congress tends to legislate when current practices are insufficient, especially when it thinks the problem has been solved by prior legislation.[178]

In addition, the flexibility associated with prosecutorial discretion is strongest at the local level. Prosecutorial decisions by municipalities concerning which cases to pursue and what remedies to seek may be more even-handed because of the vested interests in losing the industries being regulated.[179] The local law departments can also deter future pollution discharges by making an example out of a particularly noncompliant industry.[180] In addition, companies would have ample incentive to avoid direct federal involvement in favor of a familiar, flexible local entity filling the void before a federal agency can step in.[181] Another advantage is that the county or municipality, because it enacted the ordinance, will be more familiar with the local regulations than ordinarily is the case with federal regulations imposed on the local level.[182] When the enforcing agency has direct familiarity with a regulation, it is more likely to act on it.[183] Utilizing existing specialized local entities will translate to increased efficiency and less expansion at the federal level.

2. Long-term Program.—As a long-term strategy, federal involvement should be similar to the short term program. The EPA should, however, activate a prosecuting mechanism for utilizing NPDES penalty provisions when state or local violations occur but are not prosecuted. The federal duties should also require a minimum threshold of

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172. Freeman, *supra* note 8, at 142-43 & n.62.

173. John B. Braden & Donald L. Uchtmann, *Soil Conservation Programs Amidst Faltering Environmental Commitments and The "New Federalism"*, 10 B. C. ENVTL. AFF. L. REV. 639, 676 n.213 (1982).

174. *Id.*

175. Freeman, *supra* note 8, at 142.

176. *See* Shabman & Milon, *supra* note 12, at 89.

177. Lehner, *supra* note 161, at 61.

178. For instance, the WQA addressed inefficiencies of § 208 when most states chose not to implement their management plan. *See supra* text accompanying note 47. Another example is the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, which were passed to address the cities' failure to meet air quality goals. Lehner, *supra* note 161, at 61-62.

179. Lehner, *supra* note 161, at 58-59.

180. *Id.* at 58.

181. *Id.*

182. *Id.* at 52.

183. *Id.*

regulation by the state programs. The state's role, however, should be intensified to a level of higher involvement than for the short-term goal realization. Active local efforts need very little additional assistance from the state to function properly.[184] Consequently, the state's participation in those localities should be minimal.

For those areas where no local government program exists, the state should gear up for enforcing the state statute in order to provide a minimum level of enforcement throughout the state.[185] In this type of framework, the state would not have to police its entire area to ensure proper compliance with the statute; the state government need only be active in areas where the local governmental unit decided not to enact and enforce an ordinance.[186] By leaving the active local unit alone, the state saves critical resources and the proactive local entity enjoys the autonomy it deserves. Also, states should not become active in enforcement until the local programs have operated for a period of time. The local successes and failures could then be utilized to better structure the state efforts. While the state would be responsible for enforcement in those areas lacking a construction site permitting program, the state could encourage participation by the local entities through inspections and enforcement actions, thereby creating some local interest in administering the program.[187]

The benefits of this type of structuring are significant. First, basing the new regulation on a familiar framework eases apprehensions about how it will function. Because the delegation-of-responsibility system has demonstrated its strengths and weaknesses, the construction permitting system can build upon that history to create an improved hierarchy.

Second, states that withhold authority and delegate to only those counties or municipalities qualified to administer the program ensure a minimum level of regulation for sediment control.[188] The regulated businesses also enjoy some level of certainty in terms of what is expected for compliance; therefore, businesses can spend less resources on determining what is expected of them and concentrate more on compliance.[189] In addition, the state could give local units the discretion to enforce more stringent provisions to protect critical natural resources.[190]

Third, allowing local governments to actively participate in environmental regulation may change their traditional role in environmental matters, particularly regarding lawsuits. Cities and counties are often sued as a result of the "dirty" services they provide.[191] Because municipalities are frequently defendants, significant resources are expended to address their legal obligations. Much of their efforts are allocated to defending actions

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184. *See, e.g.*, NORTH CAROLINA STUDY, *supra* note 91, at VIII-2 to VIII-3.

185. *See supra* text accompanying notes 110-112.

186. *See generally* INSPECTION AND ENFORCEMENT DATA, *supra* note 115 (state conducts inspections only where local programs are not in force).

187. *See supra* text accompanying notes 182-83.

188. One author argues that inconsistency is an unfair burden on business. Burgin, *supra* note 161, at 22. For the view that uniformity may not be desirable, see Freeman, *supra* note 8, at 144.

189. *See supra* notes 86-87 and accompanying text.

190. Cost-efficiency of regulations can be enhanced if local units have discretion in protecting areas more sensitive to pollution. Freeman, *supra* note 8, at 132.

191. Lehner, *supra* note 161, at 52.

instead of planning future program directions.[192] A more active role in environmental regulation can lead to less backpedaling in response to being sued and more activism in terms of legal actions and program goals.[193]

Fourth, state supervision of local regulation actions can offer another tier of enforcement available for pursuing legal remedies against noncomplying construction contractors.[194] If local entities with permitting programs are too bashful to punish a violator, the state can have discretion in enforcement actions.[195] When a noncomplying business supplies a large portion of the local economic base and the county or municipality will not punish for fear of repercussions, the state may have to act for the local unit. Similarly, if a state's interests are such that enforcement against a large employer cannot withstand political pressure, then the federal tier of enforcement is still available under CWA provisions.[196] Here, the insulation between local political power and the federal framework provides a benefit to the stormwater program.

Finally, the state can act as a coordinator of local efforts. When pollution problems cross jurisdictional boundaries, a dilemma prevalent in water pollution,[197] the state can step in to facilitate the efforts of local governmental units. Cooperation among equal units of government, although extremely beneficial in cases of pollution prevention or cleanup, is difficult to achieve. Pooling of efforts saves limited resources from being wasted on duplicative services. The state's role in both short-term and long-term phases of implementation should include providing technical guidance and communicating to local units the undertakings of other jurisdictions' efforts.[198] If relationships between local governments preclude cooperation, the state should serve as a facilitator between the local units or even take over a project if deemed necessary to bring the purpose of environmental efforts back into focus.[199] The end result is a multi-level governmental system that encourages local participation, mandates state participation, and provides fifty different laboratories to test varying stormwater regulation approaches.

3. Funding Mechanisms.—Funding, an omnipresent concern for new regulatory approaches, should be the federal government's primary role in construction site runoff regulation. While local and state agencies may be better suited to administer the stormwater permitting program, the funding allocations should flow primarily from federal sources. Although some states already dedicate sufficient resources to implement and maintain effective stormwater programs,[200] those currently without programs would not

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192. *Id.*

193. *Id.*

194. One court held that the CWA was intended to create a web of interrelated regulatory programs. United States v. Holland, 373 F. Supp. 665, 668 (M.D. Fla. 1974).

195. *See, e.g.*, MD. CODE ANN., ENVIR. §§ 4-114(b), 4-215(f) (1993).

196. *See supra* note 119 and accompanying text.

197. *See generally* Tripp & Oppenheimer, *supra* note 104 (noting that multi-state effort was needed to improve Chesapeake Bay's water quality).

198. *See, e.g.*, MD. CODE ANN., ENVIR. § 4-107 (1993), showing that state assistance for localities is a priority in a good regulatory framework.

199. Federal involvement came about in the 1930s and 1960s in part to coordinate multi-state efforts. Freeman, *supra* note 8, at 143. Coordination at the state level should occur for analogous reasons.

200. North Carolina, for instance, spent nearly $4 million for local programs in 1991. NORTH CAROLINA

have funds available. Because a state would be required to have a program by the long-term phase of implementation, some federal assistance would be necessary. In addition, the CWA's legislative purpose is to control point and nonpoint sources of water pollution,[201] and funding should logically flow from the entity legislating the need for funding.[202] The vehicle for funding is, however, not certain. Funding could derive from state and local permit fees, provided the amounts are not too burdensome on the construction industry. Other sources of income, however, would likely be necessary. A wholly new funding mechanism could be created along with the amended changes for section 402(p) and section 319.

Congress often resists new financing, especially where other monies already spent within the CWA have had arguably little impact on satisfying the legislation's goals.[203] The states could be left to fend for themselves in terms of receiving grants under previously existing sources like the section 104 program.[204] These grants, however, are not meant for widespread assistance to the state programs. Instead, section 104 grants are geared toward aiding model projects that alter or streamline current methods of CWA regulation.[205] A funding mechanism that could supply sufficient revenues may be point-nonpoint source trading.[206] Current funding for point source programs could be intermingled with nonpoint program funds to provide additional finances.[207] For instance, federal assistance for municipal wastewater treatment programs available under the CWA[208] currently provides little additional pollution control, but allowing usage for nonpoint programs could yield significant pollution reduction and increased cost-efficiency.[209]

Perhaps the most appropriate method of funding would be to increase section 319 funds already available to states for implementing general nonpoint programs, not just stormwater regulation. Currently, section 319 operates as a minor funding mechanism for state programs with appropriations only amounting to a small fraction of what was initially authorized.[210] Under present conditions the two different programs—section 319 general nonpoint state programs and section 402(p) stormwater permitting for industrial activities—fall appreciably short of their goals.[211] By utilizing money available under section 319 to fund new state and local-based frameworks, both programs will move

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STUDY, *supra* note 91, at V-1.

201. 33 U.S.C. § 1251(a) (1988).

202. *See* Shabman & Milon, *supra* note 12, at 86.

203. *See supra* text accompanying notes 78-81.

204. 33 U.S.C. § 1254(b)(3) (1988).

205. *Id.* § 1254(a). For instance, Maryland received a § 104(b)(3) grant to draft a model general permit and streamline processing of NOIs. MARYLAND MODEL PERMIT, *supra* note 108, at 1.

206. *See generally* Bartfeld, *supra* note 78 and accompanying text. *But see supra* note 143.

207. Shabman & Milon, *supra* note 12, at 89.

208. 33 U.S.C. § 1281(g)-(l) (1988). Now the assistance is in the form of revolving fund loans. Freeman, *supra* note 8, at 138.

209. Shabman & Milon, *supra* note 12, at 89.

210. *See supra* note 56.

211. *See supra* Part II.B.

toward achieving their objectives. Section 319 calls for state nonpoint source programs,[212] and mandating states to effectively regulate stormwater runoff from construction sites and other industrial activities will further section 319's purpose while specifically addressing the existing section 402(p)'s mandate. Although some additional monies would be needed for the section 319 mechanism, no new funding program would be created or required. The new usage of section 319 funds could effectively utilize formerly unproductive dollars to realize the CWA's mandates. Also, the federal agencies would not be burdened with new regulation; the better-suited local and state governments would handle the implementation efforts.

CONCLUSION

The current federal regulatory framework for construction site runoff is not accomplishing the goals set forth in the CWA. The importance of state involvement has been recognized, yet no framework requiring fully implemented, independent state programs has been established. Section 319, although a positive step toward the state-local nonpoint pollution control framework, is not enough. The federal system, section 402(p)'s NPDES permitting system for construction site discharges, is failing because states and localities are better suited to regulate in this area. The current programs may address the letter of the CWA, but the intent of that Act is definitely not accomplished.

Under the current system, states have discretion to enact their own measures to address stormwater discharges from construction sites. Although a few states have responded effectively, the majority of states either partially or solely rely on the federal framework to cure the degradation by nonpoint source pollution. Further, these states do not utilize municipalities and counties, levels of government that are best qualified to administer a construction site runoff program. Efforts operated wholly on a state or federal level are not suited to the local nature of stormwater regulation. In addition, insufficient funding—a common thread running throughout the unsuccessful programs—demonstrates the states' persistent lack of sincerity and commitment under the current regulatory framework.

A change is needed to correct the stormwater program's current path. The best approach is congressionally required state control primed by a short-term strategy of amending current federal legislation and encouraging local efforts. NPDES permits for stormwater would be effectively replaced by state and local regulation, although federal penalty provisions could be salvaged via the NPDES general permit's promise to comply with the local and state regulations. The federal short-term role would be limited to technical assistance and information dissemination. The state's role, in addition to encompassing the federal duties, would include the enactment of a statute to allow for a state program foundation. The local regulatory proving grounds can provide the basis for each state's stormwater program.

In the long run the federal role should switch to limited administration of the states' mandatory stormwater programs. The EPA would then be in the business of active enforcement only in egregious cases. A continued commitment, however, to providing adequate funding to the states will be a primary federal responsibility. Those funds can

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212. *See supra* notes 51-57 and accompanying text.

reside in expanded section 319 allocations, where usage of that funding can attain the goals of both section 319 and section 402(p), or in new funding mechanisms like point-nonpoint source trading, if sufficient need arises. The states, on the other hand, are needed to support the actual regulatory programs. States would provide more enforcement tools and act as the prime facilitator for the local governments. Further, states can provide some uniformity to assure a minimum level of compliance while allowing for more stringent local ordinances to protect certain resources. More importantly, though, state-based construction site runoff programs will keep federal agencies out of a regulatory area where local and state abilities are better suited. The result is a more adaptive and effective stormwater discharge regulatory framework to curtail the otherwise inevitable impact of construction activities on our environment.

SHIFTING BURDENS AND THE AMERICANS WITH DISABILITIES ACT: WHY *MCDONNELL DOUGLAS* SHOULD APPLY TO THE ADA

TIMOTHY A. OGDEN*

> I do not choose to be a common man. It is my right to be uncommon — if I can. I seek opportunity — not security. I do not wish to be a kept citizen, humbled and dulled by having the state look after me. I want to take the calculated risk; to dream and to build, to fail and to succeed. I refuse to barter incentive for a dole. . . . It is my heritage to stand erect, proud and unafraid; to think and act for myself, enjoy the benefit of my creations and to face the world boldly and say, this I have done. For our disabled millions, for you and me, all this is what it means to be an American.[1]

INTRODUCTION

Like Title VII of the Civil Rights Act of 1964 (Title VII),[2] the Age Discrimination in Employment Act of 1967 (ADEA),[3] and the Rehabilitation Act of 1973,[4] the Americans with Disabilities Act of 1990 (ADA)[5] provides protection against discrimination for many Americans. What is not clear, however, is how the burdens of production and persuasion are to be allocated between and among the parties in an ADA case brought under a disparate treatment theory of discrimination.[6] This Note will examine that issue. Specifically, it will provide a brief overview of the history, purposes, and coverage of the ADA, Title VII, the Rehabilitation Act, and the ADEA. Next, it will examine the development of the burden-shifting framework established by the Supreme Court for Title VII lawsuits, and it will analyze the various approaches to this issue utilized in

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1. Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 392 (1991) (quoting Dr. Henry Viscardi, former member of the National Council on the Handicapped).

2. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1988 & Supp. V 1993).

3. 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993).

4. 29 U.S.C. §§ 701-796 (1988 & Supp. V 1993).

5. 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

6. In a disparate treatment case, plaintiffs allege that they were treated less favorably than others because of impermissible factors such as race, color, religion, national origin, or sex. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985-86 (1988). This type of suit is to be distinguished from disparate impact actions, which involve employment practices that are facially neutral, but which have adverse effects on protected groups. *Id.* at 986. Disparate treatment cases require the plaintiff to show that the employer possessed a discriminatory intent or motive, but this showing is not required in disparate impact cases. *Id.* at 986-87. *See also* Harper v. Godfrey Co., 839 F. Supp. 583, 596 (E.D. Wis. 1993), *aff'd in part, rev'd in part*, 45 F.3d 143 (7th Cir. 1995). The argument presented in this Note only addresses disparate treatment suits where the plaintiff possesses less than the substantial amount of evidence of discriminatory intent which would be required in order for the suit to qualify as a mixed motives claim under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (partially superseded by 42 U.S.C. § 2000e-2(m) (Supp. V 1993) as stated in Hook v. Ernst & Young, 28 F.3d 366, 371 (3rd Cir. 1994)).

Rehabilitation Act cases. Finally, this Note will review the current case law addressing the allocation of burdens under the ADA, and it will explore whether the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*[7] should be utilized in discrimination suits brought under the ADA.[8]

I. AMERICANS WITH DISABILITIES ACT

A. History

The Americans with Disabilities Act of 1990 was originally sponsored by Lowell P. Weicker, Jr. in the Senate[9] and by Tony Coelho in the House of Representatives.[10] Although people may believe that little was done to protect disabled persons prior to the passage of this law, the federal government actually addressed disability discrimination in a number of different contexts prior to enacting the ADA.[11] However, despite those efforts, disabled Americans remained unprotected in areas where other types of discrimination were prohibited.[12] Some efforts were made to amend Title VII of the Civil Rights Act of 1964 to include disabled persons among the protected groups, but to no avail.[13] However, in 1984, amendments to the Rehabilitation Act of 1973 re-established the National Council on the Handicapped, which subsequently produced a report that became a catalyst for action, leading to the introduction of the ADA in Congress.[14]

B. Purposes and Coverage

Congress found that forty-three million Americans have at least one physical or mental disability[15] and that society has treated this group of people

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7. 411 U.S. 792 (1973).

8. "Neither the Supreme Court nor the Third Circuit has set out the elements of a prima facie case of discrimination under the Americans with Disabilities Act. However, cases decided under Title VII provide *in pari materia* guidance." Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1318 n.5 (E.D. Pa. 1994).

9. Weicker, *supra* note 1, at 387.

10. *Id.* at 391.

11. *Id.* at 387-89 (discussing the Act of June 10, 1948, the Architectural Barriers Act of 1968, the Rehabilitation Act of 1973, the Education of All Handicapped Children Act, and the Civil Rights Restoration Act of 1987).

12. Disabled Americans were not protected from discrimination in areas such as private employment, public accommodations, transportation, state and local activities, or state and local services. *Id.* at 389.

13. In May 1977, approximately 3,700 delegates from all parts of the United States attended the White House Conference on Handicapped Individuals. At that conference the delegates agreed upon a resolution that "mandated amendment of all sections of the Civil Rights Act of 1964 . . . to include persons with physical or mental disabilities as a separate, protected group." Such initiatives, however, were not acted upon. *Id.*

14. Congress asked the National Council on the Handicapped to study the federal laws and programs related to protection of individuals with disabilities and to issue a report recommending legislation aimed at improving those laws and programs. In February, 1986, the Council issued its landmark report, *Toward Independence*. It contained forty-five legislative recommendations, and the ADA was at the top of the list. *Id.* at 390.

15. 42 U.S.C. § 12101(a)(1) (Supp. V 1993). People have "tended to isolate and segregate individuals

unfairly.[16] In an attempt to remedy these disparities, Congress enacted the Americans with Disabilities Act.[17] The ADA provides extensive protection from discrimination for disabled individuals in a variety of contexts,[18] and it casts a wide net to cover many forms of employment discrimination.[19] Among other things, it provides that no covered entity [20] may discriminate[21] against disabled individuals[22] who are qualified[23] for a position in

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with disabilities, and . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." *Id.* § 12101(a)(2). In addition, two-thirds of disabled Americans aged 16 to 64 are unemployed, but 8,200,000 of them want to work; they just cannot find jobs. John J. Murphy, Jr., *The Employment Provisions of the Americans with Disabilities Act*, 81 ILL. B.J. 236, 236 (1993).

16. People with disabilities are intentionally excluded from various activities, they suffer the discriminatory effects of physical barriers, overprotective rules, and exclusionary qualification criteria, and they are relegated to lesser opportunities. Disabled individuals "occupy an inferior status in our society, and [they] are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. § 12101(a)(5)(6) (Supp. V 1993).

17. The purpose of the ADA is to eliminate "discrimination against individuals with disabilities," ensuring that the federal government has a central role in this process. 42 U.S.C. § 12101(b)(1) (Supp. V 1993). Interestingly, Congress exempted itself from the employment provisions of the ADA. Murphy, *supra* note 15, at 237.

18. For an in-depth analysis of the entire act, see John Ricca & Jean C. Gaskill, *Americans with Disabilities Act: A Survey of the Law, Regulations and Legislative History, in* [2] 21ST ANNUAL INSTITUTE ON EMPLOYMENT LAW 93 (PLI Litig. & Admin. Practice Course Handbook Series No. H-442, 1992).

19. Murphy, *supra* note 15, at 238.

20. "'[C]overed entity' means an employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111(2) (Supp. V 1993).

21. Among the behaviors considered discriminatory is the failure to provide reasonable accommodations to address the limitations of the otherwise qualified disabled person. 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993). Reasonable accommodations would include job restructuring, removing physical barriers, modifying work schedules, making paid or unpaid leave available, reassigning the person to another position, and providing readers or interpreters. Murphy, *supra* note 15, at 242. However, reasonable accommodation is not mandated if such accommodation would impose an undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993). An undue hardship is "an action requiring significant difficulty or expense . . . ." *Id.* § 12111(10)(A). However, most of the "necessary accommodations can be accomplished relatively cheaply. The chair of the President's Committee on Employment of People with Disabilities, Harold Russell, testified that for a majority of employees with disabilities, no accommodation will be required, and that many others can be accommodated for less than $50." Murphy, *supra* note 15, at 242. The purpose of requiring reasonable accommodation is to permit the disabled individual to perform the job's essential functions or to allow that person to enjoy the privileges that nondisabled persons enjoy, such as access to restrooms, cafeterias, etc. Harmer v. Virginia Elec. & Power Co., 831 F. Supp. 1300, 1306 (E.D. Va. 1993) (citing 29 C.F.R. § 1630.2(o) (1993) and 29 C.F.R. app. § 1630.9 (1993)). "In drafting the ADA, Congress consciously drew on the law that developed under the Rehabilitation Act, and the legislative history of the ADA indicates that reasonable accommodation is to be interpreted consistently with the regulations implemented under sections 791 and 794 of the Rehabilitation Act." *Id.* at 1306-07.

22. Disability may fall into one of three categories: a physical or mental impairment substantially limiting an individual's major life activities; a record of such an impairment; or being viewed as having such an impairment. 42 U.S.C. § 12102(2) (Supp. V 1993).

23. An individual is qualified if he or she is able to perform the essential functions of the position, with

regard to hiring, advancement opportunities, discharge, compensation, or other areas of employment.[24] The ADA applies to any person employing fifteen or more employees in an industry that affects commerce.[25] Other portions of the ADA provide protection in the areas of public services and transportation,[26] as well as public accommodations and services operated by private entities.[27]

II. SIMILARITIES OF THE ADA TO OTHER NON-DISCRIMINATION LEGISLATION

Title VII of the Civil Rights Act of 1964[28] was intended to encourage employers to hire people based on their job qualifications, rather than on the basis of race, sex, or other factors unrelated to the position,[29] and the Rehabilitation Act[30] was one of a number of small steps[31] intended to provide greater protection to disabled persons from discrimination. Additionally, the ADEA prohibited certain acts of discrimination against older individuals.[32] The similarities among these statutes and the ADA are numerous and

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or without reasonable accommodation. 42 U.S.C. § 12111(8) (Supp. V 1993). In evaluating whether a disabled person is qualified, one must first determine whether the individual meets the prerequisites for the job "such as possessing the appropriate educational background, employment experience, skills, licenses, etc." 29 C.F.R. app. § 1630.2(m) (1993). Next, one must determine whether the person can perform the essential job functions, "with or without reasonable accommodation." *Id.*

24. 42 U.S.C. § 12112(a) (Supp. V 1993). *See also* 29 C.F.R. § 1630.4 (1993).

25. For the first two years following passage of the statute, the ADA applied to employers employing twenty-five or more people. 42 U.S.C. § 12111(5)(A) (Supp. V 1993).

26. *See id.* §§ 12131-12165.

27. *See id.* §§ 12181-12189.

28. Title VII made the following unlawful:

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . or . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a).

29. Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989) (partially superseded by 42 U.S.C. § 2000e-2(m) (Supp. V 1993) as stated in Hook v. Ernst & Young, 28 F.3d 366, 371 (3rd Cir. 1994)). Interestingly, gender was included in the list of protected categories in an effort to defeat the bill. *Price Waterhouse*, 490 U.S. at 244 n.9 (citing CHARLES W. WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115-17 (1985)).

30. The Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a) (1988 & Supp. V 1993).

31. *See supra* note 11.

32. The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges

significant. For example, "the ADA seeks to ensure access to equal employment opportunities based on merit," just as Title VII does.[33] However, unlike Title VII, which does not permit consideration of personal characteristics such as sex or race in making employment decisions, the ADA requires an employer to consider a disability when the disability affects the applicant's qualifications for the position, i.e., when it creates a barrier to job opportunities.[34] Further, the ADA draws a number of its terms and definitions from Title VII and the Rehabilitation Act,[35] and the "employment decisions covered by this nondiscrimination mandate [are] to be construed in a manner consistent with the regulations implementing section 504 of the Rehabilitation Act of 1973."[36] Finally, the statute expressly provides that Title VII's "powers, remedies, and procedures" apply to the ADA and that the ADA and the Rehabilitation Act are to be handled so as to avoid duplicating efforts or imposing inconsistent or conflicting standards for comparable statutory provisions.[37]

III. *McDONNELL DOUGLAS* AND ITS PROGENY: ALLOCATING BURDENS OF PERSUASION AND PRODUCTION

Following the enactment of Title VII, the courts struggled with the allocation of the burdens of persuasion and production between and among the parties in discrimination lawsuits. Finally, in 1973, the United States Supreme Court settled the issue in the seminal case, *McDonnell Douglas Corp. v. Green*.[38] The suit involved an African-American civil rights activist (Green) who was discharged from the McDonnell Douglas Corporation. Green had worked for the company as a mechanic from 1956 until 1964 when he was laid off, apparently as part of a general reduction in force. Green believed that the employment decision was racially motivated, and in protest he illegally participated with other minority group members in parking their cars on the road that led to the corporation's plant, effectively blocking access to the plant during a morning shift change.

Green's belief that he had been a victim of discrimination was strengthened the following summer when the company advertised for qualified mechanics. He applied for a position but was not rehired. Green subsequently filed a formal complaint with the Equal Employment Opportunity Commission and later sued under Title VII of the Civil Rights Act of 1964.[39] McDonnell Douglas denied discriminating against Green,

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of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (1988 & Supp. V 1993).

33. 29 C.F.R. app. § 1630 (1993).

34. *Id.* The ADA provides parameters which guide employers in how to account for disabling conditions. *Id.*

35. *See id.* app. § 1630.2(a)-(l).

36. *Id.* app. § 1630.4.

37. 42 U.S.C. § 12117 (Supp. V 1993).

38. 411 U.S. 792 (1973).

39. The provision of the statute that was pertinent to the appeal was 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. V 1993). The Court noted that the purpose of the statute was clear from the language; Congress intended to assure equal employment opportunities and to eliminate the discrimination that led to stratified work environments to the disadvantage of minorities. *McDonnell Douglas*, 411 U.S. at 800. "'What is required by

contending that it chose not to rehire him because of his participation in the illegal conduct against the company. The district court dismissed Green's Title VII[40] claim relating to racially discriminatory hiring practices, and the Eighth Circuit reversed.[41] However, the court of appeals failed to determine how to allocate the burdens of proof.[42]

The critical issue before the Supreme Court concerned "the order and allocation of proof in a private, non-class action challenging employment discrimination."[43] It established a three-step process, clearly delineating each party's burden. First, the plaintiff must establish a prima facie case of discrimination; this can be accomplished by demonstrating the following:

> (I) that he belongs to a racial minority;
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
> (iii) that, despite his qualifications, he was rejected; and
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[44]

Following the plaintiff's showing of a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its decision.[45] Finally, the plaintiff must be given an opportunity to demonstrate that the employer's proffered reason for its decision was a pretext for a discriminatory motive.[46]

Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.'" *Id.* at 801 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971)).

40. 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. V 1993).

41. *McDonnell Douglas*, 411 U.S. at 797.

42. "The two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case." *Id.* at 801.

43. *Id.* at 800.

44. *Id.* at 802. The Court added that the elements necessary to establish a prima facie case would vary depending upon the facts of the lawsuit. *Id.* at 802 n.13.

45. *Id.* at 802.

46. *Id.* at 804. In short the plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." *Id.* at 805. The federal courts, however, are divided on the issue of what constitutes pretext. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994). Three approaches have been developed. Under the "pretext-only" rule, a plaintiff who demonstrates that the employer's articulated reasons for the adverse decision are untrue automatically prevails. *Id.* Such a finding is comparable to finding intentional discrimination. *Id.* Under a second version of the "pretext-only" rule, a showing that the employer's proffered reason is not true permits but does not compel the factfinder to infer that the real reason was not permissible under the statute. *Id.* at 1122-23. The third approach, "pretext-plus," requires "both a showing that the employer's reasons are false and direct evidence that the employer's real reasons were discriminatory." *Id.* at 1123. The Supreme Court appears to prefer the second version of the "pretext-only" rule. *Id.* "It is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2754 (1993).

The Supreme Court further clarified the *McDonnell Douglas* burden-shifting framework eight years later.[47] In *Texas Department of Community Affairs v. Burdine*, the Court examined whether, after the plaintiff had established a prima facie case, the burden should shift to the defendant to prove by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the decision existed.[48]

In *Burdine*, the plaintiff sued under Title VII, alleging gender discrimination in her employer's failure to promote her. The Fifth Circuit ultimately reversed the district court's conclusion that the defendant had successfully rebutted the plaintiff's prima facie case.[49] However, the Supreme Court vacated the opinion of the court of appeals,[50] holding that the burden that shifts to the defendant is only a burden to rebut the presumption of discrimination established by the plaintiff's prima facie case.[51] The defendant may accomplish this task by producing evidence that the employment decision was based on a legitimate, nondiscriminatory reason; the defendant does not have to persuade the court that its proffered reasons actually motivated its behavior.[52] The defendant must merely introduce, through admissible evidence, the reasons for rejecting the plaintiff. If it succeeds in carrying this burden of production,[53] the presumption[54] of discrimination

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47. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

48. *Id.* at 250.

49. *Id.* at 252. The Fifth Circuit reaffirmed its previous position, namely that a Title VII defendant must prove by a preponderance of the evidence a legitimate, nondiscriminatory reason for its employment decision, and it must also prove that the person hired was better qualified than the plaintiff. *Id.*

50. *Id.* "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253 (citing Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 (1978)). The defendant only has to produce evidence which would permit the factfinder to conclude that the rejection or refusal to hire was not motivated by discriminatory animus; what the court of appeals would require exceeds what can be mandated to meet a burden of production. *Id.* at 257.

51. *Id.* at 254. Title VII does not provide damages to plaintiffs merely because employers can not prove a legitimate reason for an adverse employment decision. Damages are only awarded to plaintiffs who prove that the employer's action was based upon race or some other prohibited factor. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2756 (1993). "That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer . . . ." *Id.*

52. *Burdine,* 450 U.S. at 254.

53. The term "burden of proof" caused confusion for some time because it was used to describe two different concepts: the burden of persuasion and the burden of production. Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 114 S. Ct. 2251, 2255 (1994). *See also* JOHN W. STRONG, MCCORMICK ON EVIDENCE § 336, at 568 (4th ed. 1992) (describing the two burdens encompassed by the phrase "burden of proof"). Dual use of the term continued into the early twentieth century. *Greenwich Collieries,* 114 S. Ct. at 2255. The Supreme Judicial Court of Massachusetts was a leader in attempting to limit the meaning of the phrase "burden of proof" to "burden of persuasion." "'[T]he party whose case requires the proof of [a] fact, has all along the burden of proof.'" *Id.* (quoting Powers v. Russell, 30 Mass. 69, 76 (1833)). The burden of persuasion remains where it started, but once the party proves a prima facie case, the burden of production shifts; the only time the burden of persuasion might shift is in the case of an affirmative defense. *Id.* (citing *Powers*, 30 Mass. at 77). The United States Supreme Court adopted the Massachusetts approach in Hill v. Smith, 260

raised by the plaintiff's prima facie case[55] is rebutted.[56]

At this stage the plaintiff's ultimate burden of proving that she was intentionally discriminated against merges with her opportunity to show that the employer's proffered reason for its action was not its true reason. She may accomplish this either by showing that a discriminatory purpose more likely motivated the employer or by showing the employer's articulated reason is not worthy of credence.[57]

IV. PURPOSES OF THE *MCDONNELL DOUGLAS* FRAMEWORK

The framework for allocating burdens between and among the parties serves a variety of purposes. First, it requires the plaintiff to distinguish his or her employment situation from legitimate but adverse human resource decisions by eliminating the most common nondiscriminatory reasons for the action.[58] Second, it provides for the possibility that an employer could avoid the time and expense of litigation by filing a motion for summary judgment or a motion to dismiss when the plaintiff cannot make a prima facie showing of

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U.S. 592 (1923). *Greenwich Collieries,* 114 S. Ct. at 2255. Justice Holmes commented that the distinction between the burden of production and the burden of persuasion "'is now very generally accepted, although often blurred by careless speech.'" *Id.* (quoting *Hill,* 260 U.S. at 594).

54. The term "presumption" is "the slipperiest . . . of legal terms," second only to its elusive cousin, "burden of proof." STRONG, *supra* note 53, § 342, at 578. Most legal scholars use the word "presumption" to describe a rule which mandates "not only that the establishment of fact B is sufficient to satisfy a party's burden of producing evidence with regard to fact A, but also at least compels the shifting of the burden of producing evidence on the question to the party's adversary." *Id.* The party against whom the presumption is directed must produce evidence to rebut the presumption, but the burden of persuasion does not shift; it "remains throughout the trial upon the party on whom it was originally cast." FED. R. EVID. 301.

55. The evidentiary relationship between the presumption arising out of the prima facie case and, consequentially, the defendant's burden of production is traditional at common law. *Burdine,* 450 U.S. at 256 n.8.

56. *Id.* at 255. "A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence." *Id.* at 256 n.10. This approach illustrates the widely followed "bursting bubble" theory of presumptions under which the presumption shifts the burden of producing evidence (related to the presumed fact) to the adversary; once that evidence is produced, "the presumption is spent and disappears." STRONG, *supra* note 53, § 344, at 582-83. *See also* Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1570 (7th Cir. 1989) (the presumption is a device for making the defendant speak, and once he does, it falls out); Lawrence v. Northrop Corp., 980 F.2d 66, 69 (1st Cir. 1992) (once the employer articulates a nondiscriminatory reason for its action, the presumption raised by the prima facie case disappears); Guthrie v. Tifco Indus., 941 F.2d 374, 376 (5th Cir. 1991), *cert. denied,* 503 U.S. 908 (1992) (if the employer offers a legitimate reason for its actions, the presumption dissolves); St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993) (once the presumption forces the defendant to produce evidence, it "simply drops out of the picture"). Other scholars believe that a presumption should fix the burden of persuasion "on the party contesting the existence of the presumed fact. A principal technical objection to such a rule has been that it requires a 'shift' in the burden of persuasion[,] something that is, by definition of the burden, impossible." STRONG, *supra* note 53, § 344, at 586.

57. *Burdine,* 450 U.S. at 256.

58. Oxman v. WLS-TV, 846 F.2d 448, 453 (7th Cir. 1988).

discrimination.[59] Third, the framework allows discrimination victims "to prevail without presenting any evidence that [the protected characteristic] was a determining factor in the employer's motivation."[60] In other words, if the plaintiff fails to discover a "smoking gun," *McDonnell Douglas* provides another avenue of relief.[61] This is important to potential discrimination victims because there will rarely be "'eyewitness' testimony as to the employer's mental processes."[62]

In addition, evaluating the burden of production will often help the judge decide whether the litigants have created a triable issue of fact.[63] The Title VII allocation of burdens and the creation of a presumption of discrimination arising out of the plaintiff's prima facie case "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."[64] The *McDonnell Douglas* framework is not intended, however, to apply to cases in which the plaintiff presents direct evidence of discrimination.[65]

V. SHIFTING BURDENS AND THE REHABILITATION ACT

The *McDonnell Douglas* standard has come to be widely accepted and utilized not only in Title VII suits, but also in ADEA cases[66] and in other situations.[67] The framework

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59. *Id.*

60. La Montagne v. American Convenience Prod., Inc., 750 F.2d 1405, 1409-10 (7th Cir. 1984). Discrimination can be subtle and even unconscious, and the employer who knowingly discriminates will likely not leave written or other records revealing the prohibited motive. *Id.* at 1410. Further, existing evidence will likely be controlled by the employer, and the employee will probably have trouble acquiring it. *Id.* "The indirect method compensates for these evidentiary difficulties by permitting the plaintiff to prove his case by eliminating all lawful motivations, instead of proving directly an unlawful motivation." *Id. See also* Perfetti v. First Nat'l Bank of Chicago, 950 F.2d 449, 451 (7th Cir. 1992), *cert. denied,* 112 S. Ct. 2995 (1992).

61. McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 371 (7th Cir. 1992).

62. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

63. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

64. *Id.* The framework, however, is not intended to be inflexible or ritualistic. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). Instead, it simply provides a logical, orderly method for evaluating the evidence in a discrimination lawsuit. *Id.* "We have cautioned that these shifting burdens are meant only to aid courts and litigants in arranging the presentation of evidence . . . ." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988).

65. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). The *McDonnell Douglas* test is designed to ensure that the "'plaintiff [has] his day in court despite the unavailability of direct evidence.'" *Id.* (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)). *But see* Price Waterhouse v. Hopkins, 490 U.S. 228, 288 (Kennedy, J., dissenting) (partially superseded by 42 U.S.C. § 2000e-2(m) (Supp. V 1993) as stated in Hook v. Ernst & Young, 28 F.3d 366, 371 (3rd Cir. 1994)) (noting that this framework applies to all disparate treatment cases, even where the plaintiff offers direct proof that the employer's action was based on a discriminatory motive).

66. The circuits generally agree that *McDonnell Douglas* applies to ADEA cases. La Montagne v. American Convenience Prod., Inc., 750 F.2d 1405, 1409 n.1 (7th Cir. 1984). *See also* Konowitz v. Schnadig Corp., 965 F.2d 230, 232 (7th Cir. 1992); Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992).

67. *See* Friedel v. City of Madison, 832 F.2d 965, 972 (7th Cir. 1987) (*McDonnell Douglas* applies to

appears to be a useful and helpful tool, and with the exception of the elements required to establish a prima facie case,[68] courts appear to apply it uniformly. However, the *McDonnell Douglas* approach has not been as widely accepted in Rehabilitation Act cases. Therefore, this Note will examine the Rehabilitation Act in greater detail.

Four elements make up a cause of action under section 504 of the Rehabilitation Act,[69] but "the Courts of Appeals have been unable to agree on the proper allocation of burdens of proof" in these cases.[70] Disabled individuals face a variety of discriminatory barriers,[71] and one view suggests that the type of obstacle confronting the disabled person will affect which analytical framework to use when addressing the allocation of burdens.[72] Thus, while the *McDonnell Douglas* approach might apply in a so-called "intentional social-bias discrimination" case,[73] the analytical framework might differ in suits peculiar to disability discrimination.

Section 504 of the Rehabilitation Act requires an employer to provide reasonable accommodations to persons with disabilities,[74] and the employer who claims that this is not possible bears the burden of proving that fact.[75] After the employer presents evidence that it cannot accommodate the plaintiff, the plaintiff bears the burden of going forward, providing evidence related to his abilities and potential accommodations that might rebut the employer's claim.[76]

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reverse discrimination claims and to claims of discriminatory application of work rules); Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985) (*McDonnell Douglas* applies to Title VII retaliation claims).

68. *See supra* note 44.

69. The plaintiff must show the following: 1) he is disabled under the Act; 2) he is "otherwise qualified" for the position; 3) he was rejected "solely by reason of" his disability; and 4) the program was receiving federal assistance. Doherty v. Southern College of Optometry, 862 F.2d 570, 573 (6th Cir. 1989), *cert. denied*, 493 U.S. 810 (1989).

70. *Id.* In Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1386-87 (10th Cir. 1981), the court concluded that the defendant bears the burden of persuasion on the "otherwise qualified" issue. But on the same issue, in Doe v. New York Univ., 666 F.2d 761, 776-77 (2d Cir. 1981), the court only placed the limited burden of production on the defendant. The court in *Doherty* declined to comment further on this issue because it was not before the court in that case. *Doherty,* 862 F.2d at 573.

71. Four types of discriminatory barriers have been identified: "1. Intentional discrimination for reasons of social bias . . . ; 2. neutral standards with disparate impact; 3. surmountable impairment barriers; and 4. insurmountable impairment barriers." Prewitt v. United States Postal Serv., 662 F.2d 292, 305 n.19 (5th Cir. 1981).

72. The *McDonnell Douglas* framework is generally applicable to "intentional social-bias discrimination" against the disabled, and Title VII disparate impact jurisprudence is applicable to disparate impact disability discrimination; however, surmountable and insurmountable barriers issues usually apply only to disability discrimination cases and are thus unique. *Id.*

73. *Id.*

74. *Id.* at 308 n.21.

75. The EEOC regulations place the burden of proving that the individual cannot be accommodated on the employer. *Id.* at 308. "[T]he burden of persuasion in proving inability to accommodate always remains on the employer . . . ." *Id.*

76. When the reasonable accommodation issue arises, the employer always bears the burden of persuasion to prove its inability to accommodate, but once the employer has produced credible evidence that such

The Second Circuit expanded on these ideas in *Gilbert v. Frank*.[77] In that case the court pointed out that a qualified disabled person is one who, with a reasonable accommodation, can perform the essential job functions at issue.[78] Once the applicant establishes that he or she is otherwise qualified by demonstrating an ability to handle the essential functions of the job with reasonable accommodation, the burden shifts to the employer to demonstrate that reasonable accommodation is impossible.[79] However, regarding other elements of the action, courts cannot agree. For example, the Tenth Circuit in *Pushkin v. Regents of University of Colorado* concluded that the *McDonnell Douglas* burden-shifting framework was not an appropriate tool to use in certain Rehabilitation Act cases.[80] The Eighth Circuit, however, refused to follow *Pushkin*, finding that the *McDonnell Douglas* approach was proper.[81]

A. *The* Pushkin *Approach*

Pushkin involved a doctor who sought admission to the University of Colorado's Psychiatric Residency Program. The plaintiff, Pushkin, who suffered from multiple sclerosis, alleged that he was not admitted because he was disabled. He subsequently sued, claiming that the university violated section 504 of the Rehabilitation Act. The court of appeals addressed a number of issues,[82] ultimately affirming the district court's conclusion that the university had violated the statute.[83]

On appeal the university argued that the *McDonnell Douglas* framework should apply to claims under section 504 of the Rehabilitation Act.[84] It contended that the plaintiff established a prima facie case of discrimination, but that he failed to show pretext following the university's articulation of a legitimate, nondiscriminatory reason for the decision.[85] The court disagreed, describing the university's characterization of the plaintiff's case as a "straw man," created only so that it could be destroyed.[86] It noted that disability discrimination is usually characterized by "more invidious causative elements"[87]

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accommodation is not possible, "the plaintiff must bear the burden of coming forward with evidence that suggests that accommodation may in fact be reasonably made." *Id.* at 310.

77. 949 F.2d 637 (2nd Cir. 1991).

78. *Id.* at 641.

79. *Id.* at 642 (citing Mantolete v. Bolger, 767 F.2d 1416, 1423-24 (9th Cir. 1985); *Prewitt*, 662 F.2d at 308)). "We note that *Mantolete* and *Prewitt* appear to have placed even the initial burden of raising the accommodation issue on the employer, characterizing the plaintiff's burden as one of coming forward 'to rebut' the showing of the employer that no reasonable accommodation is available." *Id.*

80. Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1386 (10th Cir. 1981).

81. Norcross v. Sneed, 755 F.2d 113, 117 (8th Cir. 1985).

82. In addition to the merits of the case, the court discussed whether section 504 created a private cause of action. *Pushkin*, 658 F.2d at 1377. It also addressed whether it was necessary for the plaintiff to exhaust other remedies before suing under section 504. *Id.* at 1380.

83. *Id.* at 1391.

84. *Id.* at 1384-85.

85. *Id.* at 1385.

86. *Id.*

87. *Id.*

than other types of discrimination and that it would be more appropriate to analyze a section 504 claim under a disparate impact theory; however, the statute did not provide for such an analysis.[88] Therefore, the court proceeded to focus on the language of the statute to analyze the claim. It concluded that the question was not simply whether Pushkin's disability played a significant role in his rejection; the real concern was whether the rejection was justified after expressly evaluating the implications of his being disabled.[89]

The court then turned to the issue of shifting burdens. It stated that it would be wrong to use the *McDonnell Douglas* disparate treatment test in this case and instead laid out an alternate framework for analysis. Plaintiffs must first establish a prima facie case by showing that they were otherwise qualified disabled persons and that they were rejected under circumstances giving rise to the inference that their rejection was based solely on their disability. Once the plaintiffs establish their prima facie case, the defendants have the *burden of going forward and proving* that the plaintiffs were not qualified or that their rejection from the program was for reasons other than their disabilities. The plaintiffs then have the *burden of going forward with rebuttal evidence* showing that the defendants' reasons for rejecting the plaintiffs were based on misconceptions or unfounded factual conclusions, and that the reasons articulated for the rejection encompassed unjustified consideration of the disabilities.[90]

A troubling aspect of this standard, however, is the court's use of burden of persuasion language in an apparently loose way.[91] This position contradicts other courts' views regarding who bears the burden of persuasion and who bears only a burden of production,[92] and the language can lead to confusion. For example, in *Nicely v. Rice*,[93] the plaintiff sued under the Rehabilitation Act, and the district court granted the defendant's motion for summary judgment, citing the *Pushkin* test as the appropriate standard for such a case.[94] On appeal the Tenth Circuit affirmed, citing *Pushkin*. However, it misconstrued

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88. *Id. But see* 29 C.F.R. app. § 1630.15(b-c) (1993) (describing disparate impact defenses to ADA claims).

89. *Pushkin*, 658 F.2d at 1385-86.

> The question is whether Dr. Pushkin was qualified for admission to the residency program in spite of his handicap, so that he was wrongfully rejected from the program on the basis of that handicap, or whether Dr. Pushkin's handicap would preclude him from carrying out the responsibilities involved in the residency program and future patient care, so that the University rightfully excluded him from the program after weighing the implications of his disability.

Id. at 1386.

90. *Id.* at 1387 (emphasis added).

91. "The [*Pushkin*] opinion does not carefully justify this choice of language and . . . it is not supported by any discussion . . . ." Norcross v. Sneed, 755 F.2d 113, 118 n.6 (8th Cir. 1985).

92. *See* Doe v. New York Univ., 666 F.2d 761, 776-77 (2nd Cir. 1981) (the plaintiff bears the ultimate burden of proving by a preponderance of the evidence that he was qualified); Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1386 (1994) (the burden of proof for each element lies with the plaintiff).

93. 60 Empl. Prac. Dec. (CCH) ¶ 42,062 (D. Kan. Dec. 7, 1992), *aff'd*, 1 F.3d 1249 (10th Cir. 1993).

94. *Id.* ¶ 74,208.

the language[95] of its own decision: "Once the plaintiff establishes his prima facie case, the burden shifts to the Defendant *to produce evidence* that plaintiff's rejection was for reasons other than his handicap. . . . The plaintiff then has the *burden of producing rebuttal evidence* . . . that the defendant's reasons are pretextual."[96]

A subsequent Sixth Circuit case attempted to justify *Pushkin's* apparent decision to shift the burden of persuasion, but with little success. In *Jasany v. United States Postal Service*,[97] the court noted that the *Pushkin* opinion modified the *McDonnell Douglas* framework because disability cases are unique. Persons with disabilities "are expressly rejected for employment on the basis of their handicap, whereas in Title VII cases characteristics such as race or sex are never expressly at issue as legitimate justifications for the plaintiff's rejection."[98] This argument is not persuasive. The reason the disability may be considered is that it may bear upon the individual's physical ability to perform the job, i.e., it may impact whether the person is qualified for the position.[99] This is the only sense in which the disability may be expressly considered, and it does not justify wholesale departure from *McDonnell Douglas*.

B. The Norcross *Approach*

The Eighth Circuit's position, on the other hand, exemplifies the alternate view on the applicability of *McDonnell Douglas* to section 504 cases.[100] The plaintiff, Norcross, who had been legally blind since childhood, applied for a librarian's position in a public school system. The school board ultimately selected another individual for the position because the members believed that the person they selected was better qualified than the plaintiff.[101] Norcross brought suit under section 504 of the Rehabilitation Act, and when the district court entered judgment for the defendants, she appealed, arguing that the lower court's allocation of the burden of production and the burden of persuasion was improper.[102] The district court essentially followed the standard established by the Second Circuit in *Doe v. New York University*.[103] The plaintiff first had to establish a prima facie case;[104] after she accomplished this, the court shifted the burden of going forward to the

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95. *See supra* note 90 and accompanying text.

96. Nicely v. Rice, 1 F.3d 1249, 1993 WL 298933, at **2 (10th Cir. 1993) (emphasis added). The ultimate burden, the court added, remains with the plaintiff. *Id.* Although this opinion has no precedential value, it illustrates the difficulties that the *Pushkin* language presents. *See also* White v. York Int'l Corp., 45 F.3d 357, 361 (10th Cir. 1995) (noting the *Pushkin* analysis to be "much like the *McDonnell Douglas* test" used in other discrimination cases).

97. 755 F.2d 1244 (6th Cir. 1985).

98. *Id.* at 1250 n.5 (citing *Pushkin*, 658 F.2d at 1385-86).

99. *See infra* note 208 and accompanying text.

100. Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985).

101. The board based this determination on the other individual's experience as a librarian in a similar sized school and her extensive teaching experience as compared to Norcross's experience as an assistant librarian ten years earlier and her limited teaching experience. *Id.* at 115-16.

102. *Id.* at 116.

103. *Id.* at 117.

104. Norcross had to demonstrate that she was a disabled individual, that she was otherwise qualified for

school system to rebut the presumption of discrimination that followed the establishment of the prima facie case.[105] When the school system satisfied this requirement, the burden shifted back to the plaintiff (who retained the ultimate burden of persuasion throughout) to prove that her disability was the sole basis for her rejection.[106]

Norcross argued that the lower court erred in only requiring the defendant to articulate a reason for its action. She contended that the school system should have had to prove its defense by a preponderance of the evidence.[107] The court of appeals did not agree, and it expressly rejected the *Pushkin* standard.[108] It concluded that handling the issue differently "would have impermissibly shifted the burden to the defendants on the ultimate issue -- whether handicap was the sole reason for the decision."[109] The facts of the case only raised a prima facie inference of discrimination, and it would have been wrong to require the defendant to disprove such an inference by a preponderance of the evidence.[110]

The court in *Norcross* relied to a great extent on *Doe v. New York University*.[111] In *Doe*, the court mentioned the differences between Title VII cases and section 504 claims.[112] It noted that the *McDonnell Douglas* burden shifting framework might be appropriate in a section 504 suit where the defendant disclaimed reliance on the applicant's disability,[113] but the court added that more typically the defendant admits that the disability was a factor in the decision and thus "the order of presentation of proof in such cases cannot be framed in terms of permissible versus impermissible factors."[114] The

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the position, that she had applied for the librarian's position, and that she had not been selected. Norcross satisfied these requirements. *Id.* at 116 n.3.

105. This step effectively narrowed the issue to whether the other individual was selected because she had better qualifications or because Norcross was disabled. *Id.* at 117.

106. *Id.* at 116.

107. *Id.* at 117.

108. "To the extent that *Pushkin* is inconsistent with our reasoning, we reject its conclusions on this issue." *Id.* at 118 n.6.

109. *Id.* at 117.

110. *Id.* at 119. "In the handicap context, we deal with shifting burdens not unlike those in Title VII cases." *Id.* The legislative history of section 504 does not indicate how Congress intended to allocate the burdens of persuasion and production, but it is noteworthy that the Rehabilitation Act was passed just months after the Supreme Court decided *McDonnell Douglas*. "Congress must have been aware that the discrimination law language of Section 504 would have obvious implications for the burden of proof issue." New York State Ass'n for Retarded Children, Inc. v. Carey, 612 F.2d 644, 649 n.5 (2nd Cir. 1979). *See also* Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994); Ennis v. National Assoc. of Business & Educ. Radio, Inc., 53 F.3d 55, 57-58 (4th Cir. 1995) (both noting that Rehabilitation Act suits are analyzed under the *McDonnell Douglas* framework).

111. 666 F.2d 761 (2nd Cir. 1981).

112. The court noted that section 504 cases do not always lend themselves well to the framework used for the allocations of proof in Title VII cases because in a Rehabilitation Act case, an employer may consider an applicant's disability in determining whether the person is qualified for the job; in Title VII cases, race, color, religion, sex, and national origin cannot be considered in the decision. *Id.* at 776.

113. *Id.*

114. *Id.* "The pivotal issue is not whether the handicap was considered but whether under all of the circumstances it provides a reasonable basis for finding the plaintiff not to be qualified or not as well qualified

implication here is that *McDonnell Douglas* would not apply in the "more typical" case, but the framework that the court proceeded to lay out for the allocation of burdens was remarkably similar to the *McDonnell Douglas* standard,[115] despite the fact that the *Doe* case involved a defendant who admitted to relying on the plaintiff's disability in making its decision. Further, the court in *Doe* rejected the use in this context of the *Pushkin* position regarding shifting the burden of persuasion to the employer.[116] It is difficult, therefore, to discern the significance of the distinction between a case where the defendant disclaims relying on the disability and one where the defendant admits considering the disability in conjunction with other factors.

This opinion was further muddied by *Teahan v. Metro-North Commuter Railroad Co.*[117] where the district court concluded that the defendant had not relied upon the plaintiff's disability, that the defendant had successfully articulated a legitimate, nondiscriminatory reason for terminating the plaintiff, and that the plaintiff had failed to prove pretext.[118] The plaintiff, Teahan, argued on appeal that his case was not one where the employer disclaimed reliance on his disability, and thus *McDonnell Douglas* was not applicable. He claimed that his case was the more typical kind of disability discrimination suit, where the employer acknowledged relying on the plaintiff's disability in reaching its decision, and thus *Doe's* "other approach" to section 504 claims should have applied.[119] The court in *Teahan* proceeded to analyze whether Metro-North had in fact relied on the plaintiff's disability, noting that such analysis was significant because "where the employer relies on an employee's handicap for its employment decision, the employer has the burden of proving[120] the handicap is relevant to the job requirements."[121] The

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as other applicants." *Id.*

115. Plaintiffs can establish a prima facie case by showing that they are disabled, that they are qualified for the position despite the disabilities, and that they were rejected because of the disabilities. The employer then must rebut the inference that it improperly considered the disabilities by *going forward with* (i.e., *producing) evidence* that the disabilities were relevant to the qualifications for the positions sought. Plaintiffs then have the ultimate burden of proving by a preponderance of the evidence that they are qualified despite the disabilities. *Id.* at 776-77.

116. "To the extent that the district court here relied upon the reasoning of the Tenth Circuit in *Pushkin v. University of Colorado,* . . . we find that reliance misplaced." Doe v. New York Univ., 666 F.2d 761, 777 n.7 (2nd Cir. 1981). New York University did not have the burden of proving that Doe was not an otherwise qualified disabled person. It only needed to show that the disability was relevant to the reasonable qualifications for readmission. *Id.*

117. 951 F.2d 511 (2nd Cir. 1991), *cert. denied,* 113 S. Ct. 54 (1992).

118. *Id.* at 514.

119. Where the employer acknowledges reliance on the individual's disability, it must follow the plaintiff's prima facie case with evidence which rebuts the inference that the disability "was improperly considered by demonstrating that it was relevant to the job qualifications." *Id.* at 515 (citing *Doe*, 666 F.2d at 776 and Puskin v. Regents of Univ. of Colo., 658 F.2d 1372, 1387 (10th Cir. 1981)).

120. In *Doe,* the court did not use this language; rather, it said that the employer had to "go forward" with evidence that the disability was relevant to the qualifications. *Doe*, 666 F.2d at 776. The language that the court in *Teahan* uses suggests that the burden of persuasion lies with the employer. *See supra* note 53.

121. *Teahan*, 951 F.2d at 515. In evaluating whether Metro-North had relied on Teahan's disability, the district court focused on the apparent distinction between the disability and its consequences. On appeal, the court

defendant must do this in order to rebut the inference that the disability was improperly considered because an employee can be fired "solely by reason of" his disability even though the employer disclaims reliance on that disability.[122] The court concluded that Metro-North's decision to fire Teahan for excessive absenteeism caused by his substance abuse problem was termination "solely by reason of" that problem for purposes of section 504, and thus, Metro-North did rely on the plaintiff's disability.[123] The implication is that the defendant should have had "to prove" that the disability was relevant to the job requirements.

A Ninth Circuit case also addressed the scenario where the defendant actually does disclaim reliance on the plaintiff's disability.[124] The lower court in *Smith v. Barton* did not follow *McDonnell Douglas*, and the court of appeals reversed.[125] Neither of the plaintiffs, both of whom were legally blind, sought any special accommodation; they simply alleged that the employer discriminated against them based on overt prejudices. Citing *Doe*, the court in *Smith* concluded that "the analytic frameworks employed in Title VII cases should apply" to this suit.[126] The court agreed with the court in *Pushkin* that a plaintiff would have a difficult time demonstrating a purpose or intent to discriminate solely on the basis of disability; however, it distinguished *Pushkin* and thus chose to apply *McDonnell Douglas*, noting that in *Pushkin* the defendant did not disclaim reliance on the plaintiff's disability. There, the university rejected the plaintiff because of his disability. The court in *Smith* noted that the approach it adopted applied only to those cases where the defendant disclaimed reliance on the disability and where "the plaintiff allege[d]

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noted that the lower court misinterpreted *Doe's* holding "that when an employer 'disclaims any reliance' on a plaintiff's handicap, the burden is automatically shifted to the plaintiff to disprove the employer's proffer of a legitimate (i.e., nondiscriminatory) reason for the termination." *Id.* at 516. The court further noted that "disclaiming reliance" referred to any reliance and that when an employer bases a discharge on conduct caused by a disability, it is relying on that disability in making its decision. *Id.*

122. *Id.*

123. *Id.* at 517.

124. Smith v. Barton, 914 F.2d 1330 (9th Cir. 1990), *cert. denied*, 501 U.S. 1217 (1991). In *Smith*, the court noted that the case was unusual because the defendants disavowed reliance on the plaintiffs' disabilities. "Few courts have had the occasion to decide whether there was illegal discrimination" under these circumstances. *Id.* at 1339.

125. Following a bench trial, the magistrate found that the plaintiffs were disabled under the Act and that they were otherwise qualified for the newly created position. However, the magistrate concluded that they failed to establish a prima facie case because they did not show "that they were excluded from the position solely by reason of their handicap." *Id.* On appeal the court pointed out that the magistrate misread *Doe*. Where the defendants disclaim reliance on the disability, *McDonnell Douglas* applies; therefore, to establish a prima facie case, the plaintiffs must show that they applied for a job, that they were qualified for that job, and that they were rejected "'under circumstances indicating discrimination on the basis of an impermissible factor.'" *Id.* at 1340 (quoting *Doe*, 666 F.2d at 776). The burden then shifts to the defendant to rebut the presumption of discrimination by producing evidence that the decision was based upon a legitimate, nondiscriminatory reason. *Id.* If the defendant articulates such a reason, the burden shifts back to the plaintiff to show that the proffered reason is a pretext for a discriminatory motive. *Id.* (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

126. *Id.*

invidious discriminatory intent."[127]

VI. *McDONNELL DOUGLAS* AND ADA CASES

A. Southern District of Indiana

A number of recent federal district court decisions have recognized the need to address the applicability of the *McDonnell Douglas* burden-shifting framework to the ADA,[128] but few have undertaken the analysis in sufficient depth. [129] Unlike other decisions related to this topic, Judge McKinney's opinion in *Hedberg v. Indiana Bell Telephone Co.*[130] at least contemplates the need to further explore this topic. In that case Indiana Bell discharged the plaintiff, Hedberg, in the fall of 1992 as part of its Workforce Resizing Program. Several months prior to his termination, Hedberg learned that he was suffering from amyloidosis, a life-threatening health condition, and he later contended that Indiana Bell Telephone Company (IBT) was aware of this fact. Hedberg subsequently sued, alleging that IBT's decision to fire him was based on a discriminatory motive and that IBT therefore violated the ADA.

Hedberg argued that he could "establish a prima facie case of employment discrimination pursuant to the burden shifting analysis used in Title VII employment discrimination cases pursuant to *McDonnell Douglas Corp. v. Green* . . . ."[131] The court acknowledged that decisions under section 504 of the Rehabilitation Act could provide guidance to courts in analyzing the relatively new ADA,[132] and it proceeded to examine the merits of Hedberg's claim[133] before returning to the *McDonnell Douglas* issue.

The court then observed that Hedberg failed to cite any case which articulated what

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127. *Id.* at 1340.

128. Others have addressed ADA claims without addressing where the burdens lie. *See* Doe v. Harvard Univ., Nos. 93-2051, 93-2234, 94-1589, 1994 WL 558162, at *2 (1st Cir. Oct. 12, 1994) (affirming the lower court's dismissal of the plaintiff's ADA claim without addressing the relevant burdens).

129. *See* Douglas Massengill & Harvey R. Boller, *Violations of the Americans with Disabilities Act: Who Bears the Burden of Proof?,* 17 EMP. REL. L.J. 225 (1991).

130. No. IP 93-1344 C, 1994 WL 228184 (S.D. Ind. March 14, 1994), *aff'd,* 47 F.3d 928 (7th Cir. 1995). The Seventh Circuit did not explicitly address the applicability of the *McDonnell Douglas* framework to the ADA. *See infra* note 155.

131. *Hedberg,* 1994 WL 228184, at *4 (S.D. Ind. March 14, 1994), *aff'd,* 47 F.3d 928 (7th Cir. 1995). Hedberg also contended that whether IBT's proffered reason for firing him was a pretext for disability discrimination remained a genuine issue of material fact, precluding summary judgment under *McDonnell Douglas. Id.*

132. The court cited the text of the statute at 42 U.S.C. § 12117(b) (Supp. V 1993). It also cited a Northern District of Illinois opinion which noted that section 504 and numerous state handicap laws will be helpful in deciding questions of law in ADA cases. *Hedberg,* 1994 WL 228184, at *4 (citing EEOC v. AIC Sec. Investigation, Ltd., 820 F. Supp. 1060, 1064 (N.D. Ill. 1993). *See also* Harmer v. Virginia Elec. & Power Co., 831 F. Supp. 1300, 1307 (E.D. Va. 1993) (noting that suits brought under the Rehabilitation Act can shed light on ADA cases).

133. The court held that Hedberg's ADA claim must fail if IBT decided to terminate him without knowledge of his disability. *Hedberg,* 1994 WL 228184, at *4.

must be shown to establish a prima facie case under the ADA, or even any case that applied *McDonnell Douglas* to the ADA.[134] Instead, Hedberg simply proceeded with his argument, contending that the elements necessary to establish a prima facie case under the ADEA provided the elements that had to be shown under the ADA.[135] The court then analyzed the case under the assumption that *McDonnell Douglas* was applicable and that Hedberg could establish a prima facie case. It ultimately concluded that Hedberg could not show that IBT's articulated reason for firing him was pretextual,[136] and thus it did not further pursue the issue of whether *McDonnell Douglas* could be used in an ADA case.[137]

B. District of Nebraska

The District of Nebraska also addressed whether the *McDonnell Douglas* standard should apply to the ADA[138] (though the claim there was not an employment claim under the ADA),[139] and for the first time, a federal court of appeals recognized the applicability of this framework to the ADA.[140] In *Petersen ex rel. Petersen v. Hastings Public Schools*, the court noted that the similarity between Title VII and the ADA[141] provided sufficient justification for applying the Supreme Court's Title VII approach to the allocation of the burdens of persuasion and production. The Court added that Title VII is designed to ensure that when many considerations factor into employment decisions, fair and non-discriminatory choices are made.[142] An ADA claim raises a question not unlike a Title VII claim, namely what proof of discrimination must be shown in an environment "where a discriminatory reason may be hidden by non-discriminatory factors"?[143] The lower court in *Petersen* found for the defendant,[144] and on appeal the Eighth Circuit not only affirmed the lower court's decision on the merits,[145] but it also explicitly affirmed the district

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134. *Id.* at *6.

135. *Id.* Hedberg contended that in order to shift the burden of producing evidence to IBT to proffer a legitimate, nondiscriminatory reason for its decision, he needed only to establish the following three elements: 1) that he was disabled (i.e., a member of the protected group); 2) that he was meeting his employer's legitimate performance expectations; and 3) that other persons not in the protected group were treated more favorably. *Id.*

136. IBT's decision to fire Hedberg followed its perceived need to shrink its work force, and Hedberg could not produce evidence showing that this reason was pretextual. *Id.*

137. "Furthermore, . . . it is not clear that a *McDonnell Douglas* analysis may be applied to ADA claims," but even if the framework is applicable, IBT would still prevail. *Id.* at *7.

138. Petersen *ex rel.* Petersen v. Hastings Pub. Sch., 831 F. Supp. 742 (D. Neb. 1993), *aff'd*, 31 F.3d 705 (8th Cir. 1994).

139. *Petersen* involved an ADA challenge to a school system's use of a particular sign language system to educate its hearing-impaired students. *Petersen*, 31 F.3d at 705.

140. *Id.* at 708.

141. Much like the purpose of Title VII, the purpose of the ADA is to protect the individual against discrimination or exclusion based on that person's disability. *Petersen*, 831 F. Supp. at 753.

142. "Because of the vast number of reasons which may impact such a decision, proving that a discriminatory reason was involved is extremely difficult." *Id.*

143. *Id.*

144. *Id.* at 755.

145. *Petersen*, 31 F.3d at 709.

court's use of the *McDonnell Douglas* burden-shifting framework. The plaintiffs challenged, among other things, the lower court's burden-shifting analysis, contending that the court erred in finding that the school district met its burden of proof regarding legitimate, non-discriminatory reasons for using the signing system.[146] The court of appeals concluded "that the district court did not err in analyzing the issue . . . ."[147]

C. Eastern District of Virginia

In *Harmer v. Virginia Electric & Power Co.*,[148] the court applied *McDonnell Douglas* to an ADA claim without explanation.[149] The plaintiff, Harmer, alleged that Virginia Electric retaliated against him[150] because he requested accommodation for his pulmonary disability. The court concluded that to prevail, Harmer had to follow the three-step proof process established in *McDonnell Douglas*.[151] The court decided, however, that even assuming Harmer could establish a prima facie case, he would still fail because he could not show that Virginia Electric's proffered reason for its action was a pretext for retaliation.[152] The court also applied the burden-shifting framework to Harmer's claim for retaliatory failure to promote,[153] again without explanation or any rationale for its decision.

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146. *Id.* at 708.

147. *Id.*

148. 831 F. Supp. 1300 (E.D. Va. 1993).

149. Shortly thereafter the Eastern District of Virginia applied *McDonnell Douglas* to another ADA claim. Tyndall v. National Educ. Ctrs., Inc., No. CIV.A.3:93CV369, 1993 WL 730727, at *5 (E.D. Va. Oct. 26, 1993), *aff'd*, 31 F.3d 209 (4th Cir. 1994) (citing Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985), Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241-46 (4th Cir. 1982), and *Harmer*, 831 F. Supp. at 1308). The court in *Tyndall* indicated that in order for the plaintiff to establish a prima facie case of retaliation, she must demonstrate that she was in the protected class, that her employer took adverse action against her, and that there was a causal connection between the two. *Id.* The burden then shifts to the employer to articulate a legitimate non-retaliatory reason for its action, and, after doing so, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the proffered reason is pretextual. *Id.* The Fourth Circuit affirmed the lower court's grant of summary judgment to the defendant without commenting on the applicability of the burden-shifting framework. *Tyndall*, 31 F.3d at 216.

150. The ADA prohibits retaliation against individuals who seek to have their rights under the Act enforced. *Harmer*, 831 F. Supp. at 1307-08. "'No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.'" *Id.* at 1308 n.13 (quoting 42 U.S.C. § 12203(a) (Supp. V 1993)).

151. First, Harmer had to establish a prima facie case of retaliation by showing: "(1) he engaged in protected activity; (2) his employer took an adverse employment action against him and (3) a causal connection exists between the protected activity and the adverse action." *Id.* at 1308. If the plaintiff successfully establishes the prima facie case, the defendant must then articulate a legitimate non-retaliatory reason for its decision. Producing such evidence would then shift the burden back to Harmer to show by a preponderance of the evidence that Virginia Electric's proffered reason was "unworthy of belief and that the real reason for [its] action was to retaliate against him for having taken the protected action of requesting accommodation." *Id.*

152. *Id.*

153. On this claim Harmer had to show that 1) he engaged in a protected activity; 2) he applied for and

On that claim, Harmer could not show a prima facie case. The court concluded that even if he had made a prima facie showing, he could not show pretext; therefore, Virginia Electric must prevail.[154]

D. Northern District of Illinois

In *DeLuca v. Winer Industries, Inc.*,[155] plaintiff DeLuca alleged that he was dismissed in violation of the ADA, contending that his employer, Winer Industries, fired him because of multiple sclerosis. The court stated that in order to prevail, DeLuca had to establish that he was dismissed because of his disability. The court noted that DeLuca could accomplish this task either by demonstrating through direct evidence that he was fired because of his disability, or by meeting the standard established in *McDonnell Douglas* and shifting the burden to the defendant.[156] The only explanation the court provided for applying this standard was that the ADA was similar to both Title VII[157] and the ADEA.[158] It offered no other justification for utilizing *McDonnell Douglas*, it cited no precedent for applying the *McDonnell Douglas* standard to the ADA, and the court did not refer to any Rehabilitation Act case law. Instead, it relied entirely on Title VII and

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was qualified for the job; 3) he was rejected despite his being qualified; and 4) his request for accommodation was considered by the employer in not promoting him. *Id.* at 1309.

154. *Id.*

155. 1994 WL 374197 (N.D. Ill. July 13, 1994), *aff'd*, 53 F.3d 793 (7th Cir. 1995). In affirming the district court, the Seventh Circuit noted that even though it had never explicitly held that the *McDonnell Douglas* test applied to disability suits, the parties did not contest its use, and the court assumed "that we should also analyze ADA cases under that framework." *DeLuca*, 53 F.3d at 797. *See also* Flasza v. TNT Holland Motor Express, Inc., 159 F.R.D. 672, 676 (N.D. Ill. 1994). In *Flasza* the court noted that for the plaintiff to prevail on an ADA claim, he had to prove that the employer discriminated against him because of his disability. "Direct evidence of employment discrimination is rare. Flasza may prove his discrimination claim through the use of the burden-shifting method established for Title VII cases in *McDonnell Douglas* . . . ." *Id.* (citing *DeLuca*, 1994 WL 374197, and Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310 (E.D. Pa. 1994)). The plaintiff can thus establish a prima facie case by demonstrating that 1) he was a member of the protected class; 2) his performance met the employer's legitimate expectations; 3) he was discharged; and 4) he was replaced by someone outside the protected class. *Id.* In *Flasza*, the plaintiff failed to establish that he was disabled under the statute. *Id.*

156. *DeLuca*, 1994 WL 374197, at *2.

157. *See supra* note 141. In *Doe v. Kohn Nast & Graf, P.C.*, the defendants sought summary judgment on an ADA discrimination claim. The plaintiffs had proceeded on a pretext theory, so the court applied the *McDonnell Douglas* framework. It noted that under the ADA, the plaintiff was required to show that 1) he was a member of the protected class; 2) he was qualified for the position; and 3) he was fired. 862 F. Supp. at 1318. The court added that it was not necessary for the plaintiff to prove that his disability was the sole cause of the employer's adverse action. *Id.* If the plaintiff meets this burden, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for its action, and upon such a showing, the plaintiff will only succeed upon further demonstrating that the employer's reason is not worthy of credence. *Id.* (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981)).

158. "Because the standards under the ADA, the ADEA, and Title VII are identical, the following discussion relies on cases decided under all three statutes." *DeLuca*, 1994 WL 374197, at *8 n.3.

ADEA cases[159] in making its determination.[160] Ultimately, the court concluded that even if the burden shifted and the defendants carried their burden, DeLuca could not show pretext. Therefore, Winer prevailed.[161]

In another suit brought in the Northern District of Illinois,[162] the plaintiff, Schartle, alleged disability discrimination, and the court applied *McDonnell Douglas*.[163] The court acknowledged that although the *McDonnell Douglas* standards were "originally developed for Title VII cases, it is probably appropriate to apply them to ADA cases and Schartle has suggested the use of the *McDonnell Douglas* factors in this case."[164] Schartle was not able to establish the fourth element of the prima facie case, so the court granted Motorola's

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159. The court concluded that because there was no direct evidence showing defendants' intent to discriminate, DeLuca could, pursuant to *McDonnell Douglas*, shift the burden to Winer by showing: 1) he belonged to the protected class; 2) he met his employer's legitimate performance expectations; 3) he was discharged; and 4) employees not in the protected class received better treatment than he did. *Id.* at *4 (citing Oxman v. WLS-TV, 846 F.2d 448, 455 (7th Cir. 1988), an ADEA, reduction-in-force case). Winer did not dispute that elements (1) and (3) were met, but it contended that DeLuca failed to meet its legitimate performance expectations and that DeLuca was not treated less favorably than others outside the protected group. *Id.*

160. The court noted that Winer demonstrated that there was no evidence of discriminatory intent and that DeLuca could not satisfy the standards of the *McDonnell Douglas* burden-shifting test. However, it added that even if the defendants had not made those showings, they would still prevail: "The defendants are entitled to judgment by showing that DeLuca was fired for a legitimate, nondiscriminatory reason unrelated to disability." *Id.* at *7 (citing Hong v. Children's Memorial Hosp., 993 F.2d 1257, 1261 (7th Cir. 1993), *cert denied*, 114 S. Ct. 1372 (1994)). It is important to note that the court's choice of words "by showing that" could be interpreted to mean that the defendant must prove that the articulated reason was the actual motive behind the defendant's action. Though the remainder of the opinion does not support such a reading, the possibility of its being interpreted that way is a strong indication of the importance of word choice in these cases. *Hong* used the actual *McDonnell Douglas* language, i.e., the employer must "'articulate some legitimate, nondiscriminatory reason' for the plaintiff's treatment." *Hong*, 993 F.2d at 1261 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). This language leaves no room for misinterpretation.

161. *DeLuca*, 1994 WL 374197, at *8.

162. Schartle v. Motorola, Inc., No. 93 C 5508, 1994 WL 188469 (N.D. Ill. May 11, 1994).

163. "There is little case law under the ADA thus far, but cases decided under the Rehabilitation Act and Title VII provide guidance." *Id.* at *2. The court listed the following elements as necessary to establish a prima facie case: 1) the plaintiff is a member of the protected class; 2) the plaintiff met the employer's legitimate performance expectations; 3) the plaintiff was terminated; and 4) the employer sought to replace the plaintiff. *Id.* (citing *McDonnell Douglas Corp,* 411 U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)). The court did not cite any Rehabilitation Act cases which "provided guidance." *See also* Braverman v. Penobscot Shoe Co., 859 F. Supp. 596, 603 (D. Me. 1994). "Because Braverman has not presented direct evidence of disability discrimination, the Court again applies the *McDonnell Douglas* framework." *Id.* (citing *Schartle*, 1994 WL 188469, at *2). Braverman was within the protected class, he raised the issue of whether he met the employer's legitimate performance expectations, he was terminated, and he was replaced. The defendant then articulated a legitimate, nondiscriminatory reason for firing him, and Braverman raised a question of material fact regarding pretext. *Id.* Therefore, the employer's summary judgment motion on the issue of disability discrimination was denied. *Id.* at 607.

164. *Schartle*, 1994 WL 188469, at *2.

motion for summary judgment.[165] The court also denied Schartle's motion to reconsider.[166]

E. Eastern District of Michigan

The Eastern District of Michigan took a different approach.[167] In *Mayberry v. Von Valtier,* the plaintiff alleged the defendant violated the ADA when she was denied treatment due to her deafness. Noting that the standards and regulations of the Rehabilitation Act are applicable to the ADA,[168] the court looked to *Pushkin* for guidance: "The Court will apply the modified burden-shifting analysis developed in cases under the Rehabilitation Act to the ADA."[169] If the plaintiff successfully states a prima facie case,[170] the burden will shift to the defendant *to prove* either that the plaintiff was not denied treatment or that denying treatment was not unlawful.[171] The burden then shifts again, and the plaintiff must *rebut* the defendant's reasons by demonstrating that they are pretextual.[172]

Another opinion from the same district approached an ADA claim differently from the *Mayberry* court's approach.[173] The court in *Sherman v. Optical Imaging Systems* did not utilize *Pushkin's* modified burden-shifting approach; instead, it relied on an age discrimination case to establish the elements of a prima facie case under the ADA.[174] The

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165. *Id.* Further, the court concluded that even if Schartle had shown the fourth element of a prima facie case, Motorola's proffered legitimate, nondiscriminatory reason for its action would have withstood Schartle's attempt to show pretext. She introduced no evidence "that the proffered reason is unworthy of belief or that another reason was the true reason motivating Motorola's action." *Id.* at *3.

166. Schartle v. Motorola, Inc., No. 93 C 5508, 1994 WL 323281, at *1 (N.D. Ill. June 24, 1994). "Schartle also contends that we erred in applying the Title VII prima facie case elements to her Americans with Disabilities Act claim. It is unnecessary to revisit that question in light of the above discussion." *Id.* at *2. The Northern District of Illinois has since addressed the *McDonnell Douglas* issue even more explicitly. R.G.H. v. Abbott Lab., No. 93 C 4361, 1995 WL 68830, (N.D. Ill. Feb. 16, 1995). In *R.G.H.* the court noted that despite the defendant's "suggestion that it may not be appropriate, the Court concurs with the widespread practice of allowing disability discrimination plaintiffs to attempt to prove their case by way of the *McDonnell Douglas* shifting-burden method." *Id.* at *12 n.15 (citations omitted). *Cf.* Hall v. Janet Wattles Ctr., No. 94 C 50239, 1995 WL 254411, at *4 n.7 (N.D. Ill. April 14, 1995) (as the issue was not before the court, it did not address the applicability of *McDonnell Douglas* to the ADA).

167. Mayberry v. Von Valtier, 843 F. Supp. 1160 (E.D. Mich. 1994).

168. *Id.* at 1164.

169. *Id.* at 1166. In Jasany v. United States Postal Serv., 755 F.2d 1244, 1249-50 n.5 (6th Cir. 1985), the Sixth Circuit adopted the *Pushkin* approach to allocating burdens. *Mayberry,* 843 F. Supp. at 1165.

170. To show a prima facie case of discrimination under Title III of the ADA, the plaintiffs must prove that they are disabled, that the provider's office is a place of public accommodation, that they were denied full treatment because of their disabilities, and that this occurred under circumstances giving rise to an inference that the denial was based solely on the disabilities. *Mayberry,* 843 F. Supp. at 1166.

171. *Id.*

172. *Id.*

173. Sherman v. Optical Imaging Sys., Inc., 843 F. Supp. 1168 (E.D. Mich. 1994).

174. The court noted that the Sixth Circuit uses the "prima facie case/ legitimate, nondiscriminatory

court concluded that Sherman could not establish three of the prima facie elements; thus, the employer prevailed.[175]

F. Other Districts

In recent months a number of other district courts have followed the lead of those discussed above in applying the *McDonnell Douglas* framework to the ADA. Included among these are district courts in Pennsylvania,[176] Alabama,[177] Texas,[178] Florida,[179] Missouri,[180] Iowa[181] and California.[182]

VII. APPLYING *MCDONNELL DOUGLAS* TO THE ADA

Few courts have had opportunities to interpret the Americans with Disabilities Act's provisions as Congress only enacted it in 1990.[183] The courts that have addressed legal issues under the ADA have thus looked to other discrimination legislation, including the Rehabilitation Act of 1973,[184] for guidance.[185]

Some courts have suggested that the *McDonnell Douglas* burden-shifting framework is not appropriate for disability discrimination suits. For example, the Fifth Circuit noted that the kind of obstacle confronting a disabled person affects whether the *McDonnell Douglas* framework will apply;[186] if the case involves intentional social bias, the approach is applicable, but if the facts indicate that the job applicant faces surmountable or

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reason/ pretext for discrimination analysis . . . ." *Id.* at 1181 (citing Roush v. KFC Nat'l Management Co., 10 F.3d 392, 396 (6th Cir. 1993), *cert denied*, 115 S. Ct. 56 (1994)). The court listed the following elements of a prima facie case of discrimination under the ADA: 1) the employee must be disabled under the statute; 2) the employee must be qualified for the position, with or without accommodation; 3) the employee must have been discharged; and 4) the employee must have been replaced by a person who is not disabled. *Id.* Interestingly, the court concluded that the analysis that it applied to the Michigan Handicappers' Civil Rights Act claim essentially controlled the ADA claim. However, it provided different criteria for establishing a prima facie case under the former suit. Specifically, the plaintiff had to show the following: 1) that he was handicapped; 2) that the handicap was not connected to his ability to perform the job; 3) that he was terminated; and 4) that there was some evidence that the employer acted with discriminatory intent. *Id.* at 1177.

175. *Id.* at 1181.

176. Zambelli v. Historic Landmarks, Inc., CIV.A. 94-3691, 1995 WL 116669, at *7-8 (E.D. Pa. March 20, 1995).

177. West v. Russell Corp., 868 F. Supp. 313, 316-17 (M.D. Ala. 1994).

178. Aikens v. Banana Republic, Inc., 877 F. Supp. 1031, 1036-37 (S.D. Tex. 1995).

179. Keller v. Western-Southern Life Ins., 881 F. Supp. 1559, 1563 (M.D. Fla. 1995).

180. Ferry v. Roosevelt Bank, 883 F. Supp. 435, 440 (E.D. Mo. 1995).

181. Fink v. Kitzman, 881 F. Supp. 1347, 1373 (N.D. Iowa 1995); Hutchinson v. United Parcel Serv., 883 F. Supp. 379, 393 (N.D. Iowa 1995).

182. Sunkett v. Olsten Temporary Serv., No. G94-20027, 1995 WL 507044, at *3 (N.D. Cal. Aug. 17, 1995).

183. 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

184. 29 U.S.C. §§ 701-796 (1988 & Supp. V 1993).

185. *See supra* note 132.

186. *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 305 n.19 (5th Cir. 1981).

insurmountable barriers, it will not apply.[187] The Tenth Circuit contended that disability discrimination is caused by more invidious elements than other types of discrimination[188] and that courts should depart from the allocation of burdens laid out in *McDonnell Douglas*.[189] A number of courts have also suggested that the *McDonnell Douglas* approach might apply to disability cases where the employer claims that it did not rely on the disability in making its decision, but where the employer did rely on the disability, this framework would not be appropriate.[190] None of these contentions is persuasive in the context of the ADA. Like other discrimination legislation, the ADA requires an understandable and manageable approach to allocating the burdens of persuasion and production between and among the parties, and the framework established by the Supreme Court in *McDonnell Douglas* provides such an approach. A number of scholars suggest that *McDonnell Douglas* should apply to the ADA.[191] Further, the drafters of the implementing regulations contemplated that this approach to allocating the burdens would be applicable to the ADA: "It may be a defense to a charge of disparate treatment . . . that the challenged action is justified by a legitimate, nondiscriminatory reason."[192]

The argument that the type of barrier confronting the disabled person will determine whether the *McDonnell Douglas* approach will apply is not valid. Rather, it is the employer's behavior that will impact the theory under which a court will analyze an allegation of disability discrimination, and the courts possess tools adequate to address these claims without resorting to a new, modified *McDonnell Douglas* framework. In *Pushkin v. Regents of the University of Colorado*,[193] the court suggested that the Rehabilitation Act claim at issue there would have been more appropriately analyzed

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187. *See supra* notes 71-72.

188. *See* Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981).

189. *See supra* note 90 and accompanying text.

190. *See supra* notes 112-13, 121, 124-25 and accompanying text.

191. Traditional Title VII defenses stated in *McDonnell Douglas* and *Burdine* may be applicable to the ADA. Ricca & Gaskill, *supra* note 18, at 228: "[T]he 'traditional' defense to a charge of discrimination under Title VII (McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)) is applicable to charges of disparate treatment brought under the ADA." Jana H. Carey, *The Americans with Disabilities Act, in* [2] 21ST ANNUAL INSTITUTE ON EMPLOYMENT LAW 245 (PLI Litig. & Admin. Practice course handbook Series No. H-442, 1992).

> Since the ADA looks to the Rehabilitation Act as a key source of interpretive authority for analyzing employment discrimination claims, and the Rehabilitation Act looks to Title VII for interpretive guidance when the discriminatory conduct involved is protected against under both statutes, it is reasonable to conclude that the ADA will also utilize Title VII analysis, modified by applicable Rehabilitation Act cases, when the discrimination involved is prohibited by those statutes. This is consistent with the relationship between the ADA and Title VII.

Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475, 1492 (1994).

192. 29 C.F.R. § 1630.15(a) (1993). "The 'traditional' defense to a charge of disparate treatment under title VII as expressed in *McDonnell Douglas* . . . may be applicable to charges of disparate treatment brought under the ADA." 29 C.F.R. app. § 1630.15(a) (1993) (citing Prewitt v. United States Postal Serv., 662 F.2d 292 (5th Cir. 1981)).

193. 658 F.2d 1372 (10th Cir. 1981).

under a disparate impact theory,[194] but because that statute did not provide for such an analysis,[195] the court proceeded to modify the *McDonnell Douglas* approach.[196] Unlike the Rehabilitation Act, however, the ADA's implementing regulations recognize that a disability suit might be brought under either a disparate treatment theory or a disparate impact theory.[197] Therefore, no good reason exists for departing from the usual approaches to those types of actions.[198] The kind of barrier confronting the disabled person should impact the framework of analysis only to the extent required to determine whether the disparate treatment or the disparate impact theory is more appropriate, and if the plaintiff sues under the disparate treatment theory, the *McDonnell Douglas* framework should apply.

For example, if an employer excluded an employee from staff meetings because the person's face was severely disfigured, or if the employer established a policy of not hiring persons with AIDS, regardless of their qualifications, these behaviors would constitute disparate treatment, and *McDonnell Douglas* would provide the appropriate framework for allocating the burdens of production and persuasion between and among the parties.[199] Similarly, if an employer hired a sighted person rather than an equally qualified blind person because the employer believed it would be convenient to have an employee with a driver's license, this behavior would constitute disparate impact because it involved uniformly applying a criterion that had the effect of screening the disabled person, and the employer would have to show that the criterion was a business necessity.[200]

Blindness would surely constitute an insurmountable barrier to acquiring a driver's license,[201] yet this barrier would not justify modification of the *McDonnell Douglas* framework. In the example described above, a court would simply look to the guidelines established under disparate impact cases to address the relevant issues; conversely, if the employer were treating blind persons differently from sighted persons, the disparate treatment theory and the *McDonnell Douglas* framework would apply. In short, these theories are sufficient to accommodate allegations that various types of employment barriers hindered an applicant's access to a position. No justification exists for resorting to some other approach that is likely only to confuse the litigation and to hinder the efficient administration of justice.

Similarly, the contention that the causative elements of disability discrimination are more invidious than those of other types of discrimination cannot be supported. Is the typical disability discrimination scenario more offensive or unfairly discriminating than, for example, a race discrimination situation where an employer, confronted by an African-American applicant for a position, immediately concludes that even though the individual

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194. *Id.* *See supra* note 88 and accompanying text.

195. *See supra* note 88 and accompanying text.

196. *See supra* note 90 and accompanying text.

197. *See* 29 C.F.R. § 1630.15 (a)-(c) (1993) and 29 C.F.R. app. § 1630.15 (a)-(c) (1993).

198. *See supra* note 6.

199. *See* 29 C.F.R. app. § 1630.15(a) (1993).

200. *See id.* § 1630.15(b)-(c). A more extensive exploration of the disparate impact theory of discrimination is beyond the scope of this Note.

201. *See supra* note 71. *See also* Mark E. Martin, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 155 N.Y.U. L. REV. 881, 883-84 (1980).

is qualified, he will not hire the applicant because of his race, and then proceeds to create an excuse for the decision? This is precisely the type of scenario that *McDonnell Douglas* is designed to address.[202] It would not be difficult to determine the elements of a prima facie case under the ADA,[203] so why the *McDonnell Douglas* framework should not apply to such a case defies reason.

Further, the suggestion that *McDonnell Douglas* might be applicable in a situation where the employer disclaimed reliance on the disability, but would not be applicable where the employer considered the disability in making its decision, is unsound. Other statutorily protected characteristics are "considered" in employment decisions without rendering *McDonnell Douglas* inapplicable.[204] Similarly, a failure to disclaim reliance on a disability should not lead to abandoning the *McDonnell Douglas* framework. The Tenth Circuit correctly noted that the critical question is not whether the disability played a role in the decision; rather, the focus is whether the employer's reason for its decision constituted *unjustified* consideration of the disability.[205]

The Supreme Court has held that if an employer allows a discriminatory impulse to play a part in an employment decision, it must prove by a preponderance of the evidence that it would have made the same decision absent that impulse.[206] However, considering a person's disability does not necessarily mean that the employer has allowed a discriminatory impulse to motivate its decision.

Under the ADA, an employer making an employment decision will evaluate the qualifications of the persons applying for the opening, and when the individual is disabled, that characteristic must be included in the calculation.[207] If it were not, it would be impossible to determine whether the statute had been violated.[208] Determining whether

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202. *See supra* note 60.

203. *See supra* note 8. *See also* Hutchinson v. United Parcel Serv., 883 F. Supp. 379, 394-95 (N.D. Iowa 1995). The court there concluded that "the proper prima facie case under the ADA is that most closely resembling the prima facie showing required for other forms of employment discrimination . . . ." *Id.* at 395. This showing would require plaintiffs to establish that 1) they were disabled under the ADA; 2) they were "qualified individuals" under the ADA; 3) they were subjected to an adverse employment action; and 4) they were replaced by non-disabled employees or were treated less favorably than employees who were not disabled. *Id.* at 394. The prima facie case might also include the plaintiffs' demonstrating that the employer knew of the disabilities. Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 934 n.7 (7th Cir. 1995).

204. "Race and gender always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion." Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (partially superseded by 42 U.S.C. § 2000e-2(m) (Supp. V 1993) as stated in Hook v. Ernst & Young, 28 F.3d 366, 371 (3rd Cir. 1994)).

205. *See supra* note 89 and accompanying text. *But see* White v. York Int'l Corp., 45 F.3d 357, 361 (10th Cir. 1995) (noting that *Pushkin* will not apply where the employer acknowledges that the decision to terminate an employee was premised (at least in part) on the employee's disability).

206. *Price Waterhouse,* 490 U.S. at 252-53.

207. *See* 42 U.S.C. § 12113(a) (Supp. V 1993).

208. An employer could not know whether it discriminated against a qualified individual with disabilities unless it evaluated whether the person was qualified. *See* 42 U.S.C. § 12112(a) (Supp. V 1993).

a disabled person is qualified is a two-step process,[209] and obviously, the employer is considering the disability in making these determinations. However, this behavior does not constitute prohibited discriminatory conduct, nor does it necessitate adopting a new framework for analysis in disparate treatment lawsuits. The purposes of the *McDonnell Douglas* burden-shifting approach will still be fulfilled,[210] and the courts will simultaneously benefit from the availability of a familiar and manageable tool for addressing complicated issues. Further, the plaintiff is afforded a means of showing that he suffered adverse treatment "because of"[211] his disability. If the applicant can establish in the prima facie case that he is otherwise qualified, then the employer must articulate a legitimate, nondiscriminatory reason for its decision. The implementing regulations mandate that if the employer's reason for the adverse decision is that accommodating the applicant's needs would create an undue hardship, the employer must provide proof of this fact.[212] However, this requirement does not conflict with the *McDonnell Douglas* approach to allocating burdens. Hence there is no need to create a new framework for analysis.

CONCLUSION

Perhaps the strongest argument supporting adherence to *McDonnell Douglas* in ADA cases is that no good policy reasons exist for not doing so. The courts that have advocated shifting the burden of persuasion to the employer in Rehabilitation Act cases have neither suggested that the plaintiffs in such cases are unduly burdened by the *McDonnell Douglas* framework, nor have they advanced any public policy grounds for the change.[213] It makes little sense, then, to adopt an approach that will confuse an already complex task and provide few practical benefits.[214]

The *McDonnell Douglas* framework provides a manageable system for allocating the burdens in disparate treatment cases, including disability actions involving a variety of employment barriers. The causes of disability discrimination are not more invidious than

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209. *See supra* note 23.

210. *See supra* notes 58-60 and accompanying text.

211. Congress deliberately chose to use the Title VII language ("because of") rather than section 504 language ("solely by reason of") in the ADA because the literal reading of the latter "leads to absurd results." H.R. REP. No. 485(II), 101st Cong., 2d Sess. 85 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 368.

212. An entity covered by the ADA must provide a reasonable accommodation to an otherwise qualified person "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business." 29 C.F.R. § 1630.9(a) (1993). Further, an employer cannot merely assert that the appropriate accommodation would create an undue hardship and thereby be relieved of providing it; instead, it "will have to present evidence and demonstrate that the accommodation will, in fact, cause it undue hardship." 29 C.F.R. app. § 1630.15(d) (1993). This burden is significantly different from proving that the plaintiff was not qualified or that the decision was for reasons other than disability. *See supra* note 89 and accompanying text.

213. *Cf.* Lianne C. Knych, *Assessing the Application of McDonnell Douglas to Employment Discrimination Claims Brought Under the Americans with Disabilities Act*, 79 MINN. L. REV. 1515 (1995).

214. Price Waterhouse v. Hopkins, 490 U.S. 228, 287 (1989) (Kennedy, J., dissenting) (partially superseded by 42 U.S.C. § 2000e-2(m) (Supp. V 1993) as stated in Hook v. Ernst & Young, 28 F.3d 366, 371 (3rd Cir. 1994)). *See supra* notes 95-96 and accompanying text.

the causes of other types of discrimination, and plaintiffs in ADA suits are not hampered or constrained by the *McDonnell Douglas* standard. To the contrary, they are provided with a means of demonstrating discrimination in an environment where, like Title VII and ADEA cases, direct proof may be hard to attain. Further, limiting the defendant's burden to an obligation of producing evidence will not unduly hinder the prospective employee.[215] The employer "retains an incentive to persuade the trier of fact that the employment decision was lawful."[216] And disclaiming reliance on the disability is not a necessary prerequisite to applying *McDonnell Douglas*. "Lower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*. Addition of a second burden-shifting mechanism . . . is not likely to lend clarity to the process."[217]

Departing from a well-established and effective means of addressing a difficult issue, absent substantial justification or at least explanation, is not rational or logical and will not lead to effective use of the judicial system. Until an approach is developed which substantially improves the current framework, the *McDonnell Douglas* test should be used in disparate treatment suits brought under the Americans with Disabilities Act.

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215. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).

216. *Id.*

217. *Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting).

TITLE I: PROTECTING THE OBESE WORKER?

JENNIFER SHOUP*

INTRODUCTION

Chances are, you consider yourself to be relatively enlightened, free from prejudices, and careful not to make judgments based upon characteristics like skin color or sexual preference. Yet, what would your first, unchecked thought be if a grossly overweight individual entered your office for a job interview? Though many of us hate to admit it, our first impression would probably not be a good one. Maybe we would assume the person was lazy or slovenly; maybe we would even assume he or she could not perform the available job simply due to excessive body weight. It would not be an unusual reaction; it seems many Americans, even those who consider themselves free from prejudice, are biased against obese individuals.

This Note will look at that bias, and consider whether obesity should qualify as a disability under the Americans With Disabilities Act (ADA).[1] In order to coherently address the question, this Note has been divided into four Parts. Part I will consist of an overview of the Rehabilitation Act[2] and the ADA. Part II will define obesity in its various forms. Part III will outline the First Circuit's decision in *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*,[3] examine the amicus brief submitted in Cook's favor by the Equal Employment Opportunity Commission (EEOC), and present the proposition that, in certain circumstances, obesity should be considered a disability under the ADA. Part III will also address whether the decision in *Cook* would apply in a case brought under the ADA. Finally, Part IV will consider the concerns that employers are likely to voice if obesity is recognized as a disability under the ADA and will suggest an alternative for eliminating discrimination based on obesity.

I. OVERVIEW—THE REHABILITATION ACT AND THE ADA

Congress enacted the Rehabilitation Act in 1973, under President Nixon. [4] Through this Act, Congress made a conscious effort to include individuals with disabilities in mainstream America, especially with regard to employment, by prohibiting the federal government and entities receiving federal assistance from discriminating against people on the basis of their disabilities.[5] An express purpose of the Act is to promote and expand

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1. 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

2. 29 U.S.C. §§ 701-797(b) (1988 & Supp. V 1993).

3. 10 F.3d 17 (1st Cir. 1993). *Cook* was decided under the Rehabilitation Act. *Id.* at 20.

4. 29 U.S.C. §§ 701-797(b) (1988 & Supp. V 1993); *see* HENRY PERRITT, JR., AMERICANS WITH DISABILITIES HANDBOOK (1990).

5. 29 U.S.C. § 701(a) (Supp. V 1993) reads as follows:

"Congress finds that . . . disability is a natural part of the human experience and in no way diminishes the right of individuals to—

(A) live independently;

(B) enjoy self-determination;

(C) make choices;

employment opportunities for individuals with disabilities.[6]

The Rehabilitation Act provides that "no otherwise qualified individual with a disability[7] . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[8] The Act defines an "individual with a disability" as anyone who: "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[9]

The Rehabilitation Act is a step in the right direction in that it seeks to protect disabled individuals from discrimination based solely on their disabilities. However, because Congress limited the scope of the Act to institutions and organizations that receive financial assistance from the federal government, the Act allows the vast majority of employers, those in the private sector, to continue to discriminate against disabled workers.[10] Until the enactment of the ADA, federal law did not prohibit discrimination

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(D) contribute to society;

(E) pursue meaningful careers; and

(F) enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society."

The statute also states that "the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to . . . achieve equality of opportunity, full inclusion and integration in . . . employment . . . ." *Id.* § 701(a)(6).

6. 29 U.S.C. § 701(b) (1988 & Supp. V 1993). *See also* Elizabeth C. Morin, *Americans With Disabilities Act of 1990: Social Integration Through Employment,* 40 CATH. U. L. REV. 189, 189 (1990).

7. Originally, the Act's language referred to "handicapped individuals." Congress replaced this language with the preferred phrase "individual with a disability" in 1992. With this change, the terminology of the Rehabilitation Act and the ADA are consistent. *See* Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102(f), 106 Stat. 4344, 4348. This Note will use the word "disability," rather than "handicap," unless quoting from a source that uses the word "handicap."

8. 29 U.S.C. § 794(a) (1988 & Supp. V 1993). To state a claim under the Rehabilitation Act, a claimant must show: 1) he or she is an "individual with a disability" within the meaning of the statute; 2) that he or she is "'otherwise qualified' to participate in the program or activity at issue"; 3) that he or she was "excluded from the program or activity 'solely by the reason of'" the disability; and 4) that the program or activity received federal financial assistance. Plummer v. Branstad, 731 F.2d 574, 577 (8th Cir. 1984); Strathie v. Department of Transp., 716 F.2d 227, 230 (3d Cir. 1983); Doe v. New York State Univ., 666 F.2d 761, 774-75 (2nd Cir. 1981).

9. 29 U.S.C. § 706(8)(B) (1988 & Supp. V 1993). Under the regulations that implement the Rehabilitation Act, there are three ways in which persons can qualify for protection on the basis of a perceived disability. Individuals may be "regarded as having an impairment" if they have a physical or mental impairment that does not substantially limit a major life activity, but that is perceived by an employer as imposing such a limitation. Individuals may also be "regarded as having an impairment" if they have a physical or mental impairment that substantially limits a major life activity only because of their employer's attitudes toward the impairment, or if the individuals have none of the impairments described in the Act but are treated by an employer as though they do. 45 C.F.R. § 84.3(j)(2)(iv) (1993).

10. Morin, *supra* note 6, at 190; Bonnie P. Tucker, *Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and The Future*, 1989 U. ILL. L. REV. 845, 850 (1989).

by employers in the private sector, by places of public accommodation, or by state and local government agencies that did not receive federal aid.[11]

The National Council on Disability[12] issued reports to Congress in 1986 and 1988 recommending civil rights legislation to ensure equal treatment for disabled individuals. Congress enacted the ADA in 1990[13] stating that in excess of 43,000,000 Americans have some form of mental or physical disability and that this number is increasing.[14] Congress also stated that disabled people are continually subjected to discrimination in numerous contexts,[15] and are severely disadvantaged vocationally, economically, and educationally.[16] Congress enacted the ADA to "remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities."[17] In essence, the ADA begins where the Rehabilitation Act leaves off. Title I of the ADA extends the protection given under the Rehabilitation Act because it prohibits private employers from discriminating against disabled individuals.[18]

Title I applies to employers,[19] employment agencies, labor organizations, and joint labor management committees.[20] It tracks the language of the Rehabilitation Act[21] and

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11. OGLETREE, DENKINS, NASH, SMOAK & STEWART, AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS § 1.04[1] (1994) [hereinafter OGLETREE].

12. The National Council on Disability is an agency consisting of members appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 780(a)(1)(A) (1988 & Supp. V 1993). These findings are reprinted in 1990 U.S.C.C.A.N. 330.

13. President Bush signed the ADA into law on July 26, 1990.

14. 42 U.S.C. § 12101(a)(1) (Supp. V 1993).

15. *Id.* § 12101(a)(5).

16. *Id.* § 12101(a)(6).

17. 29 C.F.R. app. § 1630 (1995). This is the EEOC's interpretive guidance explaining the major concepts of disability rights in Title I as discussed and defined in section 1630. It states that the EEOC is the agency responsible for enforcement of Title I, and that it will be guided by the provisions in the interpretive guidance when resolving charges of employment discrimination.

18. 42 U.S.C. § 12112 (Supp. V 1993); Morin, *supra* note 6, at 190; OGLETREE, *supra* note 11, at 2-24. Though this Note is only concerned with prohibited employment discrimination under Title I, the ADA prohibits more than just discrimination in employment. Other titles address discrimination against disabled people by state and local governments (Title II); discrimination against disabled people in the enjoyment of goods and services offered by places of public accommodation (Title III); discrimination in communication (Title IV); and various other issues (Title V).

19. The ADA defines an "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . ." 42 U.S.C. § 12111(5)(A) (Supp. V 1993). The ADA went into effect on July 26, 1992, two years after President Bush signed it into law. From that date until July 26, 1994, Congress limited the term "employer" to persons with "25 or more employees for each working day in 20 or more calender weeks in the current or preceding year." *Id.* On July 26, 1994, "employer" applied to persons with 15 or more employees. The ADA's definition of "employer" mirrors the definition in Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e(b) (1988).

20. 42 U.S.C. § 12111(2) (Supp. V 1993).

21. 29 U.S.C. § 794(a) (1988 & Supp. V 1993).

provides that "[n]o covered entity shall discriminate against a qualified individual[22] with a disability[23] because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[24] Title I requires employers to adopt unbiased hiring and promotion criteria and make reasonable accommodations[25] for the known physical or mental limitations of a qualified employee or applicant with a disability, unless it can be shown that the accommodation would impose an undue hardship[26] upon the operation of the business.[27]

Title I further mirrors the Rehabilitation Act in its definition of "disability." "Disability" under the ADA means, with respect to an individual: "(A) a physical or

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22. 42 U.S.C. § 12111(8) (Supp. V 1993) defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The interpretive guidance defines essential functions as those the individual holding the job must be able to perform unaided or with the assistance of reasonable accommodations. 29 C.F.R. app. § 1630.2(n) (1995). It also states that consideration shall be given to an employer's judgment as to what functions of a job are essential, and if an employer has written a description of the job before advertising or interviewing applicants, the description will be considered evidence of the essential functions of the job. *Id.*

23. The ADA uses the term "disability" instead of "handicap," which was the term originally used in the Rehabilitation Act. *See supra* note 7. The EEOC's interpretive guidance to Title I says that use of the term "disability" was an attempt by the House Committee on the Judiciary to use the "most current terminology. It reflects the preference of persons with disabilities to use that term rather than 'handicapped' . . . ." 29 C.F.R. app. § 1630.1(a) (1995) (citing H.R. REP. No. 485, 101st Cong., 2d Sess. 26-27 (1990) [hereinafter HOUSE JUDICIARY REPORT]; S. REP. No. 116, 101st Cong., 1st Sess. 21 (1989) [hereinafter SENATE REPORT]; H.R. REP. No. 485, 101st Cong., 2d Sess. 50-51 (1990) [hereinafter HOUSE LABOR REPORT]).

24. 42 U.S.C. § 12112 (Supp. V 1993). When comparing the ADA with the Rehabilitation Act, the only difference is that the Rehabilitation Act prohibits discrimination against "otherwise qualified individuals," while the ADA prohibits discrimination against "qualified individuals." 29 U.S.C. § 794(a) (1988 & Supp. V 1993).

25. 42 U.S.C. § 12111(9) (Supp. V 1993). Reasonable accommodations may include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring; part time or modified work schedules, reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id.

26. 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993); 29 C.F.R. § 1630.2(p) (1995). Undue hardship, decided on a case-by-case basis, results when an accommodation would be "unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business." 29 C.F.R. app. § 1630 (1995). Examples of factors to be considered in determining if an accommodation constitutes an undue hardship include: nature and cost of the accommodation; overall financial resources of the business; number of employees, and the overall size of the business with respect to the number of employees; effect the accommodation would have on expenses and resources; type of operation the business is involved in, including the structure, composition and functions of its work force; or impact otherwise because of such accommodation on the operation of the business. *Id.*

27. 29 C.F.R. app. § 1630 (1995).

mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[28]

To properly understand the definition of "disability," it is necessary to understand the terms the definition uses. The ADA defines "physical or mental impairment" as "any physiological disorder or condition . . . affecting one or more of [several] body systems . . . or any mental or psychological disorder."[29] It does not include physical characteristics such as "eye [or hair] color, . . . left-handedness, or height, weight or muscle tone that are within 'normal' range and are not the result of a physiological disorder."[30] "Major life activities" are those "basic activities that the average person . . . can perform with little or no difficulty . . . [including] caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive."[31] Whether an impairment "substantially limits" one or more of a person's major life activities is to be determined on a case-by-case basis.[32]

Finally, the defenses available to an employer faced with a charge of employment discrimination against a disabled individual are the same under the ADA and the Rehabilitation Act. These consist of business necessity and safety concerns.[33] Basically,

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28. 42 U.S.C. § 12102(2) (Supp. V 1993). The interpretive guidance to 29 C.F.R. § 1630.2(l) (1995) states that there are three ways an individual may satisfy being regarded as having a disability; the three ways are substantially similar to those enumerated under the Rehabilitation Act. *See supra* note 9. The first is that the individual may have an impairment which is not substantially limiting, but which is perceived by the employer as being substantially limiting. The second is that the individual may have an impairment which is substantially limiting only because of the attitudes of others toward the impairment. The third occurs when the individual does not have an impairment, but is regarded by an employer as having a substantially limiting impairment. 29 C.F.R. app. § 1630.2(l) (1995) (citing SENATE REPORT, *supra* note 23; HOUSE LABOR REPORT, *supra* note 23; HOUSE JUDICIARY REPORT, *supra* note 23).

The interpretive guidance says that the Supreme Court articulated the rationale behind the "regarded as" as part of the definition of "disability" in the context of the Rehabilitation Act in School Board of Nassau County v. Arline, 480 U.S. 273 (1987). 29 C.F.R. app. § 1630.2(1) (1995). The Court in *Arline* noted that although an individual may have an impairment that does not substantially limit a major life activity, the reaction of others may prove just as disabling. 480 U.S. at 283; *see also* 29 C.F.R. app. § 1630.2(1) (1995).

29. 29 C.F.R. § 1630.2(h)(1)-(2) (1995).

30. 29 C.F.R. app. § 1630.2(h) (1995). This definition mirrors that used in the regulations that implement the Rehabilitation Act. *See* 34 C.F.R. § 104.3(j)(2)(i) (1995).

31. 29 C.F.R. app. § 1630.2(I) (1995). Again, this definition is the same as the definition in the regulations that implement the Rehabilitation Act. *See* 34 C.F.R. § 104.3(j)(2)(ii) (1995).

32. The interpretive guidance indicates that whether an impairment is substantially limiting is not necessarily based on the diagnosis or name of the impairment. Instead, it will be based upon the effect the impairment has upon the particular individual. 29 C.F.R. app. § 1630.2(j) (1995). Some of the factors courts have used to determine whether an impairment substantially limits a major life activity include: "(i) The nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he [actual or expected] permanent or long term impact . . . of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(1)-(iii) (1995).

33. 42 U.S.C. § 12113(a) (Supp. V 1993). The statute states:

It may be a defense to a charge of discrimination under this chapter that an alleged application of

the ADA mandates that employers consider disabled applicants for employment. This means that selection criteria must be unbiased, job related, and consistent with business necessity.[34] Employers must design employment selection procedures to assure that disabled individuals are not excluded from job opportunities unless they are actually unable to perform the job. If employers use tests in their hiring processes, the burden is on the employers to choose, and administer, tests that reflect an applicant's aptitude and skills and not his or her impairment.[35] Finally, employers must look at an applicant's ability to perform essential functions of a job, and must make reasonable accommodations to assist applicants in meeting legitimate job criteria.[36]

II. OBESITY AND ITS DEFINITIONS

The term "obese" is often used generically to describe those people society regards as too heavy. General dictionary definitions are fairly broad;[37] however, medical definitions distinguish specific categories of obesity. For example, if an individual weighs 20-40% above the normal weight for his or her height, he or she is classified as mildly obese. If that weight is 41-100% above normal, the individual is moderately obese. A person who weighs more than 100% of the normal weight for his or her height is considered severely or morbidly obese.[38] Approximately 25% of the population of the United States falls within one of the three classifications of obesity.[39]

Obesity manifests itself when an individual consumes more calories than he or she expends;[40] however, the specific cause of obesity is not known. Healthcare practitioners agree that there are many contributing factors including social, genetic, developmental and

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> qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation . . . .

Id.

34. 42 U.S.C. § 12112(b)(6) (Supp. V 1993).

35. *Id.* § 12112(b)(7).

36. *Id.* § 12112(b)(5)(A).

37. The dictionary defines "obese" as "very fat or overweight; corpulent." THE RANDOM HOUSE DICTIONARY 1335 (2d ed. 1987); STEDMAN'S MEDICAL DICTIONARY, FIFTH UNABRIDGED LAWYER'S EDITION 973 (1984) [hereinafter STEDMAN'S]. *The Sloane Dorland Annotated Medical-Legal Dictionary* is slightly more specific and defines "obesity" as "an increase in body weight beyond the limitation of skeletal and physical requirement, as the result of an excessive accumulation of fat in the body." DORLAND'S notes that obesity ranges along a spectrum from "mildly inconvenient and/or unattractive to massive and often life threatening excess poundage." THE SLOAN DORLAND ANNOTATED MEDICAL LEGAL DICTIONARY 504 (1987) [hereinafter DORLAND'S].

38. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (16th ed. 1992).

39. Gordon B. Bloch, *So Long, Girth Control; Shed the Stigma, Not the Pounds: Research Shows When it Comes to Health, One Size Doesn't Fit All,* HEALTH, Feb. 1991, at 70, 70; *see also* THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (16th ed. 1992) (approximately 24% of men and 27% of women in the United States are obese).

40. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 982 (16th ed. 1992).

psychological factors, a decrease in physical activity, and in some cases physiological and neurophysiological factors.[41] Further, obese individuals may suffer from other medical problems, such as: lower back pain; aggravation of osteoarthritis, especially in the knees and ankles; amenorrhea and other menstrual disturbances; high blood pressure; increased mortality due to cardiovascular disease; surgical mortality; and an increased death rate due to disease and accidents.[42] While it is possible for an obese person to lose weight, medical texts have described obesity as a condition that is chronic and likely to progress throughout life.[43] Evidence seems to suggest that it is rare for an obese person to lose weight and keep it off.[44]

The perception of obese individuals as undesirable is widespread. Recently, the National Association to Advance Fat Acceptance (NAAFA)[45] commissioned a survey that presented persuasive evidence of an underlying social bias against obese people. The study, performed by a team of researchers from the University of Vermont, found that overweight people not only experience discrimination when looking for a job, but also experience discrimination in virtually every aspect of their lives.[46] Other studies have presented similar findings. For example, a study in the *New England Journal of Medicine* involving 10,039 randomly selected young people found that significantly overweight adolescents and young adults, those above the 95th percentile for their age and sex earn less than their average-weight contemporaries. The study also found a corollary between obesity in women and an increased poverty rate, fewer years of schooling, and a negative impact upon the chances of ever marrying.[47] Another recent study, co-authored by

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41. *Id.* at 982-93; HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1671-73 (11th ed. 1987) [hereinafter HARRISON'S]. *See also* Sharlene A. McEvoy, *Tipping the Scales of Justice: Employment Discrimination Against the Overweight*, 21 HUM. RTS. Q., Summer 1994, at 24, 24-25 ("In 1992, at a National Institute of Health conference, experts stated there was increasing physiological, biochemical, and genetic evidence that obesity is not simply a problem of will power. Instead it is a complex disorder of energy metabolism.").

42. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 984 (16th ed. 1992).

43. *Id.*

44. *Id.* ("The prognosis for obesity is poor . . . ." The Merck Manual also states that attempts to lose weight may cause complications and that symptoms of anxiety and depression may appear in as many as half of the patients undergoing treatment for obesity); *see also* HARRISON'S, *supra* note 41, at 1675; Kimberly B. Dunworth, Cassista v. Community Foods, Inc.: *Drawing the Line at Obesity?*, 24 GOLDEN GATE U. L. REV. 523, 545 (1994) (noting that researchers consistently find obese people cannot control their weight).

45. NAAFA is a Sacramento based organization that states it is "not a diet group, but [instead it] seeks alternative ways to enrich the lives of its members and larger people everywhere through public education, research, advocacy, and support." Martin Everett, *Fat Chance*, SALES AND MARKETING MGMT., Mar. 1990, at 66.

46. *Id.*

47. *Medical Study Finds Bias On Basis of Weight Recommends Application of the ADA to Obesity*, Daily Lab. Rep. (BNA) No. 189, at D9 (Oct. 1, 1993) (The researchers hypothesized that discrimination against overweight people may account for the results, and they recommended that Congress extend the ADA to cover discrimination against overweight people). *See also Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance,* 100 HARV. L. REV. 2035, 2040 (1987) (which found that the most important factor in determining candidate acceptability for a wide variety of jobs is appearance).

economist Daniel Hammermesh of the University of Texas, found that attractive people earned approximately five percent more than average looking people, and that "ugly" people earned approximately five percent less than average looking people.[48] Further, obese individuals are typically regarded as "lazy individuals who lack the self discipline to lose weight;"[49] and are generally thought to project a bad corporate image.[50]

Obese individuals are discriminated against throughout their lives in a variety of arenas. Because there is no federal legislation that prohibits discrimination on the basis of appearance, obese people often seek protection under the Rehabilitation Act or the ADA. They raise the proposition that they are disabled or, alternatively, that they are perceived by others as being disabled. While the ADA clearly does not provide protection for those who are merely overweight, it is much less clear on the question of when circumstances might warrant coverage of obesity as a disability.[51] Recently, the First Circuit Court of Appeals addressed this particular issue under the Rehabilitation Act in *Cook v. Rhode Island, Department of Mental Health, Rehabilitation, and Hospitals.*[52]

III. THE FIRST CIRCUIT TAKES A STAND

In *Cook*, a federal appeals court ruled for the first time that an employer violated the law when it refused to hire an obese individual. The ruling is also one of the first to deal with whether perceived disabilities that do not actually affect job performance are covered by federal law.[53]

Plaintiff Bonnie Cook had worked for the Defendant, Rhode Island, Department of Mental Health, Retardation, and Hospitals (MHRH) on two separate occasions as an institutional attendant for the mentally retarded. Both times her performance record was excellent. When she sought employment a third time, Cook was 5 feet 2 inches tall and weighed in excess of 320 pounds; MHRH refused to hire her. MHRH claimed that Cook's obesity impaired her ability to evacuate patients in an emergency, and that it increased her risk of developing serious medical problems, which made her more likely

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48. *Appearance Bias in Workplace is Widespread, and Usually Legal*, Daily Lab. Rep. (BNA) No. 245, at D22 (Dec. 23, 1993).

49. James G. Frierson, *Obesity as a Legal Disability under the ADA, Rehabilitation Act, and State Handicapped Employment Laws*, 44 LAB. L. J. 286, 293 (1993)

> [O]ur beliefs are firmly ingrained: thin people are beautiful, fat people are slobs; slim and trim individuals are active, go-getters, while fat people sit around and do nothing but complain; fat people could lose the weight, if they really tried; they just need to stop eating all the time; fat people will not have the energy and drive to do a good job.

Id.

50. *Id.* (citing Martin Everett, *Fat Chance*, SALES AND MARKETING MGMT., Mar. 1990, at 66).

51. The regulations that implement the ADA state that "except in rare circumstances, obesity is not considered [a disability]." 29 C.F.R. app. § 1630.2(j) (1995). The EEOC indicated in its interpretive guidance to the ADA that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact" generally would not be considered disabilities. *Id.*

52. 10 F.3d 17 (1st Cir. 1993).

53. *Id.* at 28; *see also Federal Law Bars Employment Bias Against the Obese, First Circuit Rules*, Daily Lab. Rep. (BNA) No. 225, at D4 (Nov. 24, 1993).

to be absent from work and increased the likelihood of worker's compensation claims.[54] Cook brought a claim against MHRH under the Rehabilitation Act and alleged that MHRH discriminated against her on the basis of actual or perceived disability due to her morbid obesity. MHRH moved for dismissal; it contended that morbid obesity can never constitute a disability within the meaning of the Rehabilitation Act. The trial court denied MHRH's motion to dismiss.[55]

The trial court rejected MHRH's argument that obesity alone, without resulting incapacitating complications, could never be a disability as defined under the Rehabilitation Act. It stated that obesity could be considered an actual disability if the plaintiff could prove it to be a physiological disorder that substantially limited a major life activity.[56] The court specified that it would only consider obesity to be a physiological disorder if it was caused by "systemic or metabolic factors," and only if it constituted an immutable condition.[57] It further noted that, "to the extent that obesity is a transitory or self-imposed condition resulting from an individual's voluntary action or inaction, it would be neither a physiological disorder nor a handicap."[58]

The trial court then observed that if Cook could not establish that her obesity constituted an actual disability, she still might be able to prove she was disabled due to MHRH's perception of her.[59] In discussing the parameters of a disability claim, the court noted first that the Rehabilitation Act does not require employers to hire individuals who are unable to perform a job satisfactorily simply because the inability is due to a disability.[60] The court then held that for a claim based on perceived disability to be successful, the claimant must show that the employer believed that the condition substantially limited the claimant's capacity to do work for which he or she was otherwise qualified.[61] The court found MHRH apparently based its decision not to hire Cook solely on its perception that her obesity constituted a disability that would interfere with her ability to perform her job. The court refused to dismiss the claim and stated that if Cook's obesity was the sole reason for MHRH's decision, Cook would fall within the definition of "individual with a disability" under the Act.[62] The question of whether she was "otherwise qualified" fell to the jury, who found in favor of Cook and awarded her

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54. *Cook*, 10 F.3d at 20-21.

55. *Id.* at 21.

56. Cook v. Rhode Island, Dep't of Mental Health, Rehabilitation and Hosps., 783 F. Supp. 1569, 1573 (D.R.I. 1992). To formulate this rule, the court relied on the regulations of the Department of Health and Human Services, which define a "physical or mental impairment" as "(A) any physiological disorder or condition . . . affecting one or more of the following systems: neurological; muscoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin and endocrine . . . ." 45 C.F.R. § 84.3 (j)(2)(i) (1989).

57. *Cook*, 783 F. Supp. at 1573.

58. *Id.*

59. *Id.*

60. *Id.* at 1575 (citing 29 U.S.C. § 794(a) (1988 & Supp. V 1993)).

61. *Id.*

62. *Id.* at 1576. The definition of "individual with a disability" is one who is regarded as having a physical or mental impairment which substantially limits one or more of that person's major life activities. 29 U.S.C. 706(8)(B)(iii) (1988 & Supp. V 1993).

$100,000 in compensatory damages. The court entered judgment, and MHRH appealed.[63]

The EEOC, which implements and enforces both the Rehabilitation Act and the ADA, filed an amicus brief with the First Circuit supporting Cook's position. The EEOC opposed both MHRH's assertion that obesity never constitutes a disability and the trial court's view that obesity is covered only where a physiological cause renders it an immutable condition.[64]

The EEOC rejected the assertion, as did the trial court, that obesity can never constitute a disability within the meaning of either the Rehabilitation Act or the ADA. It urged that the question of whether obesity is a disability under the Rehabilitation Act, or under Title I of the ADA, should be decided on a case-by-case basis depending upon the duration and extent of the condition.[65] The EEOC argued that "[t]here is neither a basis for nor a need to craft special rules or an analytical approach specifically for obesity cases. Rather, the standard approach to determining whether a condition is a disability . . . as reflected in case law and administrative guidance, should simply be applied to obesity."[66] It contended that this approach yields the conclusion that "obesity may, in appropriate circumstances, constitute a disability."[67] The appropriate circumstance under which obesity may be a disability under the Rehabilitation Act, and Title I of the ADA, is when it constitutes "an impairment . . . [that] is of such a duration that it substantially limits a major life activity or is regarded as so doing."[68]

Turning to the definition of an "individual with a disability," the EEOC argued that obesity, in particular morbid obesity,[69] may meet the definition of a physical impairment even if it is not a physiological disorder. To make this argument, the EEOC focused on the definition of "impairment" as discussed by the Commission's interpretive guidance on Title I of the ADA.[70] The interpretive guidance states that "physical characteristics such as . . . weight . . . that are within 'normal' range and are not the result of a

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63. Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 21 (1st Cir. 1993).

64. Brief of the Equal Employment Opportunity Commission as Amicus Curiae, Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17 (1st Cir. 1993) (No. 93-1093) [hereinafter EEOC brief].

65. *Id.* at 9. *See also EEOC Weighs In: Obesity is Protected Disability Under ADA, Rehabilitation Act,* Daily Lab. Rep. (BNA) No. 150, at D3 (Aug. 6, 1993); *Disabilities Act: ADA Requires Individualized Inquiries on Disability, Direct Threat, Official Says*, Daily Lab. Rep. (BNA) No. 141, at D27 (July 26, 1994) (Speaking at an employment law update sponsored by the American Law Institute and the American Bar Association, Peggy Mastroianni, an EEOC attorney and head of the ADA Policy Division, said that courts faced with the decision of whether an employee or applicant's medical condition is a disability covered by the ADA must pursue an individualized approach. She said that in every case except that of an HIV positive individual, the ADA requires courts to determine whether the claimed disability is an impairment that substantially interferes with one or more of the claimant's major life activities.).

66. EEOC brief, *supra* note 64, at 10-11.

67. *Id.*

68. *Id.* at 11.

69. *See supra* note 38 and accompanying text. The EEOC defines morbid obesity consistent with the definition given in THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (16 ed. 1992).

70. EEOC brief, *supra* note 64, at 11.

physiological disorder" are not impairments.[71] The EEOC argued that morbid obesity, a condition partially defined as weight outside one's "normal" weight range, fell outside the limits of this provision and, therefore, individuals who are morbidly obese do not have to suffer from a physiological disorder to qualify as disabled. On these grounds, the EEOC disputed the court's finding that obesity must be a physiological disorder to constitute an actual impairment.[72]

The EEOC next considered whether obesity could "substantially limit" one or more of an individual's "major life activities." It noted that there is no interpretation of the term "substantially limits" in the regulations to the Rehabilitation Act, and turned instead to the interpretive guidance on Title I.[73] The interpretive guidance provides that whether an impairment is substantially limiting is determined by considering: "(1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. . . . The determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis."[74] The EEOC took the position that obesity, like all other potential disabilities, should be analyzed in accordance with the above guidelines. It stated that morbid obesity is rare and chronic, and that a jury could find it a disabling impairment where there is evidence that it has a significant impact on a major life activity.[75]

The EEOC also refuted the trial court's finding that a condition must be involuntary or immutable to be covered under the ADA or the Rehabilitation Act. It noted that neither statute contained language requiring consideration of how individuals became impaired or whether they contributed to the impairment.[76] The EEOC compared morbid obesity with alcoholism, diabetes, emphysema, and heart disease, all of which are covered under both the Rehabilitation Act and the ADA even though they "may be caused or exacerbated by voluntary conduct."[77] The EEOC maintained that voluntariness should be relevant in determining whether an impairment is substantially limiting only if individuals could "easily and quickly" change the condition by altering their behavior.[78] Voluntariness is relevant in such a case because a condition that can be altered easily or quickly is transient

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71. 29 C.F.R. app. § 1630.2(h) (1995).

72. EEOC brief, *supra* note 64, at 12, n.6.

73. *Id.* at 12.

74. *Id.*; 29 C.F.R. app. § 1630.2(j) (1995).

75. EEOC brief, *supra* note 64, at 13. This position is consistent with the interpretive guidance to the regulations, which states that obesity may be a disability "in rare circumstances." 29 C.F.R. app. § 1630.2(j) (1995). *See also ADA Special Report*, 146 Lab. Rel. Rep. (BNA) No. 14, Supp. at 13 (Aug. 1, 1994); *Disabilities Act: ADA Requires Individualized Inquiries On Disability, Direct Threat, Official Says*, Daily Lab. Rep. (BNA) No. 141, at D27 (July 26, 1994); *EEOC Weighs In: Obesity is Protected Disability Under ADA, Rehabilitation Act*, Daily Lab. Rep. (BNA) No. 150, at D3 (Aug. 6, 1993). These reports reiterate that the EEOC has not taken the position that morbid obesity is always covered by the ADA. Instead, the contention is that an individual who is morbidly obese is a person with an "impairment" under the ADA; such individual still must establish that the impairment substantially limits a major life activity before he or she is considered "disabled."

76. EEOC brief, *supra* note 64, at 16.

77. *Id.*

78. *Id.*

and, therefore, unlikely to significantly limit a major life activity.[79]

The First Circuit Court of Appeals affirmed the lower court's decision and upheld the jury's award.[80] In doing so, the court analyzed the interpretive regulations of the Rehabilitation Act, noting that the definition of "physical or mental impairment" was broad, the regulations themselves were open-ended, and the list of enumerated disorders was not exhaustive.[81]

With the above findings setting the stage for its analysis, the First Circuit rejected the trial court's holding that obesity must necessarily be an involuntary and an immutable physiological disorder to qualify for coverage under the Rehabilitation Act.[82] The court adopted the reasoning urged by the EEOC, and stated:

> [The Rehabilitation Act] contains no language suggesting that its protection is linked to . . . whether an individual contributed to his or her impairment. On the contrary, the Act indisputably applies to numerous conditions that may be caused or exacerbated by voluntary conduct, such as alcoholism, AIDS, diabetes, cancer resulting from cigarette smoking, heart disease resulting from excesses of various types, and the like.[83]

It concluded that voluntariness is relevant only in determining whether a condition has a substantially limiting effect.[84]

The court next considered whether Cook's morbid obesity substantially limited one or more of her major life activities. It found that although Cook's obesity may not actually have substantially limited her major life activities,[85] MHRH perceived it as limiting her work, which is a major life activity.[86] The court observed that MHRH failed to hire Cook

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79. In its brief, the EEOC specifically says that non-chronic, mild obesity may be an example of a condition easily or quickly changeable by an alteration in behavior. The logical conclusion, then, is that mild obesity is not likely to be of sufficient duration or impact to substantially limit a major life activity. If the mild obesity has become chronic, it is less feasible to say it is easily or quickly changeable. *Id.* at 17. This view is consistent with the view expressed in the EEOC's interpretive guidance which, though it does not elaborate on factors for determining whether, in general, obesity is a disability, does emphasize the general proposition that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are generally not disabilities" because they are not substantially limiting. 29 C.F.R. app. §1630.2(j) (1995).

80. Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 20 (1st Cir. 1993).

81. *Id.* at 22-23. *See also* Smaw v. Virginia Dep't of State Police, 862 F. Supp. 1469 (E.D. Va. 1994). This case was decided after *Cook* and followed the *Cook* court's line of reasoning. The *Smaw* court, in deciding whether Smaw had a physical impairment, noted that the definition of "physical impairment" is far-reaching, and that the question of who is disabled is best suited to a case-by-case determination as opposed to simply looking to a list or category of impairments. *Id.* at 1472. The court also cited Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986) in support of this determination.

82. *Cook*, 10 F.3d at 23-24.

83. *Id.* at 24.

84. *Id.*

85. *Id.* at 25 (citing 45 C.F.R § 84.3(j)(2)(ii) (1995) which defines major life activities to include for one's self, walking, breathing, seeing, hearing, speaking, learning, working, and performing other manual tasks).

86. Cook herself told MHRH she was fully able to perform all major life activities; thus in this particular

because its physician believed her obesity interfered with her ability to walk, lift, bend, stoop, and kneel. The court concluded that MHRH did not simply perceive Cook's obesity as rendering her unable to perform the specific job of institutional attendant.[87] Instead, the court believed that MHRH perceived Cook's obesity as limiting her ability to perform a wide range of jobs; therefore, it held that there was ample evidence for the jury to find that MHRH discriminated against Cook because MHRH perceived her as having an impairment that substantially limited her major life activity of working.[88]

Writing for the court, Judge Bruce Selya held that "[i]n a society that all too often confuses 'slim' with 'beautiful' or 'good,' morbid obesity can present formidable barriers to employment. . . . Where, as here, the barriers transgress federal law, those who erect and seek to preserve them must suffer the consequences."[89]

One cannot help but wonder what impact this decision will have for obese individuals who face employment discrimination. Questions remain unanswered, such as whether the decision will apply to claims under the ADA as well as those under the Rehabilitation Act, and whether other circuits will agree with, and follow, Judge Selya's words. A strong argument can be made that this decision, at least among the courts bound by the First Circuit, paves the way for obesity claims under not only the Rehabilitation Act, but also under the ADA. The strongest support is found in the ADA itself.

The ADA specifically provides that the ADA and the Rehabilitation Act are to be considered in tandem. It states that "except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under [the Rehabilitation Act]."[90] The statute also requires enforcement agencies to promulgate procedures to insure that complaints filed under both the Rehabilitation Act and the ADA are handled in a way that avoids "duplication of effort" and the application of conflicting standards.[91] Arguably, the ADA is meant to be an expansion of the protections afforded under the Rehabilitation Act, and, therefore, the law under the ADA should not diverge from the law developed under the Rehabilitation Act. Based on this view, to the extent the *Cook* case holds that obesity, particularly morbid obesity, may be a disability under the Rehabilitation Act, it also holds that obesity may be a disability under the ADA.

Further, many of the definitions of key terms, significantly the definition of "disability," are the same under both the ADA and the Rehabilitation Act.[92] Even if the

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case, morbid obesity was not an impairment that substantially limited one or more of the individual's major life activities.

87. *Id.* MHRH's physician was of the opinion that obesity affects "'virtually every body system,' including the cardiovascular, immune, muscoloskeletal, and sensory systems." *Id.* at 23 n.6.

88. *Id.* at 28.

89. *Id.*

90. 42 U.S.C. § 12201 (Supp. V 1993); 29 C.F.R. §1630.1(c)(1)-(2) (1995); *see also* 29 C.F.R. §1630.1(b) and (c) (1995) (which also states that the ADA does not preempt any state law granting individuals with disabilities protection greater than or equivalent to protection provided by the ADA); OGLETREE, *supra* note 11, at § 201[4].

91. 42 U.S.C. § 12117(b) (Supp. V 1993). *See also ADA, Joint Explanatory Statement of the Committee of Conference,* H.R. REP. No. 596, 101st Cong., 2d Sess. 66, *reprinted in* 136 CONG. REC. 4597 (1990); HOUSE LABOR REPORT, *supra* note 23, at 83; HOUSE JUDICIARY REPORT, *supra* note 23, at 83.

92. The EEOC's interpretive guidance says that in adopting the same definition of "disability" as the

ADA did not specify that the ADA and the Rehabilitation Act are to be considered together, the identical definitions lend force to the argument that, absent precedent under the ADA, decisions under the Rehabilitation Act are persuasive, perhaps even mandatory precedent.[93]

As the court in *Smaw v. Virginia Department of State Police*[94] denoted, the standards of the ADA mirror those of the Rehabilitation Act; therefore, it is logical to assume that cases under the ADA that are similar to those under the Rehabilitation Act will follow the trends established by the Rehabilitation Act.[95] The court in *Smaw* felt that the ADA would not create "a new avenue for claims in the area of disability discrimination; rather, the ADA incorporates the existing language and standards of the Rehabilitation Act in this area."[96]

IV. CONCERNS

A. Increased Perceived Disability Claims

Cook affirmed a finding of employment discrimination based upon perceived disability.[97] As the *Cook* court pointed out, such claims have, in the past, been rare. [98] However, it seems a legitimate concern that, in the wake of *Cook,* such claims will become more prevalent. *Cook* offers some reassurance, however, by indicating that a perceived disability claim, at least insofar as obesity is concerned, is relatively narrow. The court emphasized that MHRH's physician believed that Cook's obesity precluded employment in the healthcare industry in general, rather than merely perceiving her as limited in the ability to perform the single, specific job of institutional attendant.[99] Had MHRH viewed Cook as unable to perform the specific job in question, assuming that the job required unique physical skills, as opposed to unable to perform a wide spectrum of jobs that required no unique physical skills, it is unlikely that Cook would have prevailed under the perceived disability theory.[100]

Rehabilitation Act, "Congress intended that the relevant case law developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA." 29 C.F.R. app. § 1630.2(g) (1995) (citing SENATE REPORT, *supra* note 23, at 21; HOUSE LABOR REPORT, *supra* note 23, at 50; HOUSE JUDICIARY REPORT, *supra* note 23, at 27.)

93. *See Federal Law Bars Employment Bias Against the Obese, First Circuit Rules*, Daily Lab. Rep. (BNA) No. 225, at D4 (Nov. 24, 1993) (reporting that Cook's attorney believes that the First Circuit's ruling is applicable to claims brought under the ADA because of the similarity of the language in the two Acts, and because both have the same definition of disability. The EEOC agreed.).

94. 862 F. Supp. 1469 (E.D. Va. 1994).

95. *Id.* at 1474.

96. *Id.*

97. Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 20 (1st Cir. 1993).

98. *Id.* at 22. "Up to this point in time . . . few 'perceived disability' cases have been litigated and, consequently, decisional law involving the interplay of perceived disabilities and Section 504 is hens teeth rare. Thus, this case calls upon us to explore new frontiers." *Id.*

99. *Id.* at 25.

100. *Id.* at 25-26. The court stated that perceiving an individual as unable to perform a job that

Recently, the Eastern District of Virginia reiterated the limitations set forth in *Cook*, and delineated the necessary elements of a successful perceived disability claim.[101] In *Smaw*, a former Virginia state trooper brought suit against the Virginia State Police (VSP) under both the Rehabilitation Act and the ADA. She alleged that the VSP discriminated against her on the basis of actual and perceived disability. Smaw had been employed as a state trooper from 1982 until 1991. Although Smaw weighed 219 pounds at the time she was hired, which meant she exceeded the maximum weight for her job, the VSP hired Smaw with the understanding that she would lose enough weight to comply with departmental weight guidelines. Over the years, Smaw received numerous written warnings concerning her weight. In 1988, a VSP doctor worked with her to establish a weight loss goal of three pounds per month; Smaw consistently failed to meet this goal. As a consequence, the VSP released her from her job as a trooper and reemployed her as a dispatcher.[102]

In addressing Smaw's claims, the court recognized work as a major life activity.[103] However, the court noted that this does not necessarily mean working at the job of one's choice.[104] In support of its position, the court turned to the regulations implementing the ADA, which include the statement that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."[105] The court also looked to prior case law for guidance, and noted that "courts have differentiated between an employer's rejection of an employee . . . due to a perception that the individual is unable to perform the duties of that job, and denial because the employer believes the individual is inherently incapable of working at any of a number of jobs."[106] The former does not violate either the Rehabilitation Act or the ADA; the latter violates both. Though it supported its position with other cases, the court relied most heavily on *Cook*. It noted that *Cook* makes it clear that an employer must regard an individual's impairment as "the type that would defeat many or all kinds of employment."[107] As the

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necessitated unique physical skills would not equal perceiving the individual as substantially limited in the major life activity of working. *Id.*

101. Smaw v. Virginia Dep't of State Police, 862 F. Supp. 1472 (E.D. Va. 1994).

102. *Id.* at 1469, 1471-72.

103. *See* 29 C.F.R. § 1613.702(c) (1995) (listing activities that qualify as major life activities).

104. *Smaw*, 862 F. Supp. at 1473.

105. *Id.* (quoting 29 C.F.R. § 1630.2(j)(3)(i) (1995)).

106. *Id.* at 1474. The court cited case law supporting the general principle that an employer has not violated either the Rehabilitation Act or the ADA because of the perception that an employee cannot do a specific job. For example, it referred to the statement by the Sixth Circuit that "an impairment that interfered with an individual's ability to do a particular job, but did not significantly decrease that individual's ability to obtain satisfactory employment otherwise, was not substantially limiting within the meaning of the [Rehabilitation Act]." *Id.* (citing Jasany v. United States Postal Service, 755 F.2d 1244, 1248 (6th Cir. 1985) (also quoted in *Cook)). See also* Daley v. Koch, 892 F.2d 212, 214-16 (2d Cir. 1989) (sustaining rejection as a police officer because of personality traits of poor judgment and responsibility); Welsh v. Tulsa, 977 F.2d 1415, 1417-18 (10th Cir. 1992) (upholding termination of a firefighter due to minor sensory loss in one hand); Tudyman v. United Airlines, 608 F. Supp 739, 746 (C.D. Cal. 1984) (sustaining termination of airline steward due to bodybuilders bulk).

107. *Smaw*, 862 F. Supp. at 1473 (quoting Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 25 (1st Cir. 1993)). The language used in *Cook* reads as follows: "[d]enying an applicant

Smaw court states, this is a narrow view of how an employer must act in order to violate the Rehabilitation Act or the ADA on the basis of perceived disability.[108] Basically, it means that an employer must view the individual as unqualified for more than just a specific job or a narrow range of jobs. Instead, the employer must be shown to have viewed the individual as unqualified for a broad range of occupations. As the First Circuit Court of Appeals noted in *Cook,* there is a "significant legal distinction between rejection based on a job specific perception that the applicant is unable to excel at a narrow trade and a rejection based on a more generalized perception that the applicant is impaired in such a way as would bar him from a large class of jobs." [109]

On this basis, the court distinguished Smaw's claim from Cook's.[110] The court pointed out that, unlike the VSP, Cook's employer regarded Cook's obesity as a disability that would prevent many or all kinds of employment, as opposed to merely the particular position of institutional attendant.[111] In granting summary judgment for the VSP, the court found that the VSP's reasons for its decision to reclassify Smaw were job specific concerns rationally related to her ability to perform her duties.[112] Further, the VSP reemployed her as a dispatcher, a job still within her chosen field of law enforcement.[113] As a result, Smaw could not establish that the VSP regarded her obesity as a disability that foreclosed a broad range of employment opportunities.[114] The significance of this is that while there is an avenue open for a perceived disability claim under either the Rehabilitation Act or the ADA, that avenue is relatively narrow. Simply because employers perceive an employee or applicant as unable to perform a specific job due to a disability does not mean a court will determine that they have violated the Rehabilitation

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. . . a single job that requires no unique physical skills, due solely to the perception that the applicant suffers from a physical limitation that would keep her from qualifying from a *broad spectrum of jobs*, can constitute treating an applicant as if her condition substantially limited a major life activity." *Cook,* 10 F.3d at 25 (emphasis added).

108. *Smaw*, 862 F. Supp. at 1473.

109. *Cook*, 10 F.3d at 26. Based on the brief it submitted in *Cook*, the EEOC seems to concur with this holding. The EEOC conceded that inability to perform a particular job, or a limited class of jobs, was insufficient in and of itself to establish a substantial limitation of a major life activity. Therefore, an employer's "perception that a physical or mental impairment prevented an individual from performing a particular job would not suffice by itself to show that the individual was perceived to be substantially limited in a major life activity." EEOC brief, *supra* note 64, at 18-19. The EEOC also cited cases supporting this position. For example, in Horton v. Delta Airlines, 1993 W.L. 356894 (N.D. Cal.), the court followed prior interpretations of the Rehabilitation Act in a case involving an overweight flight attendant. It granted summary judgment for Delta on a perceived disability claim, holding that working as a flight attendant was just one particular job with the airline and did not qualify as a substantial limitation of a major life activity under the ADA. This was especially true because the plaintiff failed to pursue opportunities for ground positions offered by the defendant. *See* EEOC interpretive guidance, 29 C.F.R. app. § 1630.2(j) (1995).

110. *Smaw*, 862 F. Supp. at 1475.

111. *Id.*

112. *Id.* The VSP's reasons included the fact that being a trooper requires that an individual "[be] able to protect oneself from assault, and to pursue, confront, and capture offenders." *Id.* Because these were job specific concerns, the VSP did not violate the Rehabilitation Act or the ADA. *Id.*

113. *Id.*

114. *Id.*

Act or the ADA. While this may seem weak reassurance to employers leery of perceived disability claims relating to obesity, it is, nonetheless, reassurance. Furthermore, such a concern is not of sufficient magnitude to prohibit perceived disability claims based on obesity.

Title I of the ADA seeks to eliminate employment discrimination based upon an individual's disability. As noted earlier, Congress had specific reasons for including perceived disabilities within the definition of "disability."[115] Being perceived as having a substantially limiting impairment may, in fact, prove to be as disabling as actually having such an impairment. Given this fact, it is certainly within the spirit of the Act to include those who are only perceived as unable to perform a wide range of occupations. For these reasons, notwithstanding the possibility of increased perceived disability claims based on an employer's perceptions of an obese worker, obesity should, in appropriate circumstances, be covered as a disability under the ADA.

Claims based on obesity as an actual disability are similarly limited. While *Cook* and *Smaw* recognize that obesity may constitute an actual disability in certain circumstances, the qualifying circumstances are narrow. This should ease the minds of employers who fear a proliferation of "obesity lawsuits." At first glance, the position taken by the EEOC, that obesity does not have to be a physiological disorder to constitute an impairment because obesity by definition falls outside one's "normal" range,[116] seems to lend force to the argument that all levels of obesity should be covered under the ADA. However, the EEOC's position only establishes that obesity can constitute an "impairment." As the court in *Smaw* stated, even if individuals can establish that their obesity qualifies as an impairment, they still must show that the impairment substantially limits their ability to perform a major life activity, such as working.[117] Thus, within the definition of "disability" there is a limitation that serves to topple the argument that obesity in all forms will be protected under the ADA. Protection is likely to be limited to those extreme cases involving an individual who is morbidly obese, because such an individual can more easily establish that the obesity interferes substantially with a major life activity. Because morbid obesity affects only approximately 0.5% of all obese people, which translates to less than 0.1% of the entire population,[118] it is unlikely that there will be many successful obesity claims under the ADA.

B. Disability Discrimination v. Appearance Discrimination—A Cautionary Note

Cook's attorney felt that their victory was the first "unqualified success" for severely overweight people, because the court interpreted a generally applicable federal law in their favor.[119] However, one must take care not to read too much into *Cook*. As discussed in the preceding section, *Cook*, and subsequently *Smaw*, are relatively narrow decisions. Moreover, the cases point to a fact that is important to remember. The ADA and the

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115. *See supra* note 28.

116. EEOC brief, *supra* note 64, at 12 n.6. *See also* 29 C.F.R. app. § 1630.2(h) (1995).

117. *Smaw*, 862 F. Supp. at 1474.

118. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 984 (16th ed. 1992).

119. *Federal Law Bars Employment Bias Against Obese, First Circuit Rules*, Daily Lab. Rep. (BNA) No. 225, at D4 (Nov. 24, 1993).

Rehabilitation Act are statutes prohibiting discrimination against individuals who are disabled, whether they are actually disabled or perceived by potential or actual employers as disabled. They do not prohibit discrimination solely on the basis of a person's appearance. As of yet, federal law does not prohibit appearance discrimination; neither *Cook* nor *Smaw* changes that.

The decision in *Cook*, that obesity may be a disability in certain situations, does help those individuals who are morbidly obese; but it does not necessarily offer hope for the mildly or moderately obese person, or the person who is simply overweight and regarded by society as unattractive.[120] As Miriam Berg, President of the Council on Size and Weight Discrimination in New York, points out, "a lot of the discussion of disability is really a smokescreen." In reality, the issue obese individuals fight regularly is discrimination based on appearance.[121]

It is not the purpose of either the ADA or the Rehabilitation Act to protect those who suffer from appearance discrimination; for this reason, appearance discrimination should not be covered under the perceived disability provisions of either Act. Nevertheless, discrimination based on some aspect of an individual's appearance, such as obesity, is an important issue that must be remedied. One solution is to enact legislation that designates weight as a protected classification. As noted earlier, a substantial portion of the United States' population falls within one of the classifications used in the medical definition of obesity,[122] and that number is increasing.[123] Because obese individuals comprise a relatively large percentage of the population, protection from discrimination is warranted. This position is strengthened by the fact that a significant factor in the enactment of the Civil Rights Act of 1964,[124] the Age Discrimination in Employment Act of 1967,[125] the

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120. *See Appearance Bias in Workplace is Widespread, and Usually Legal,* Daily Lab. Rep. (BNA) No. 245, at D22 (Dec. 23, 1993) (citing Sally Smith, executive director of NAAFA, as pointing to the fact that the *Cook* decision protects the morbidly obese, not the just generally overweight). *See also Smaw*, 862 F. Supp. at 1474-75 (The court cites 29 C.F.R. § 1630 (1995) and notes that "case law and the regulations both point unrelentingly to the conclusion that a claim based on obesity is not likely to succeed under the ADA.").

121. *See Appearance Bias in Workplace Is Widespread, and Usually Legal*, Daily Lab. Rep. (BNA) No. 245, at D22 (Dec. 23, 1993). This article touches on whether appearance can be a perceived disability under the ADA, and seems to answer in the negative. The article states that being considered by employers as unattractive, for example due to obesity, is not likely to create a viable claim of discrimination based upon perceived disability because being considered unattractive is not the same as being perceived as having "a substantially limiting impairment." One example given is the misconception that all blondes are stupid. This misconception may result in discrimination; but, because having blonde hair is not perceived as having a substantially limiting impairment, it will not be covered under the ADA or the Rehabilitation Act. To couch this in the language of the interpretive guidance, blonde hair is a physical characteristic that is "normal" and is not the result of a physiological disorder; therefore, it is not an impairment. 29 C.F.R. app. § 1630.2(h) (1995).

122. *See* THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 981 (16th ed. 1992) ("The prevalence of obesity in the USA is 24% of men and 27% of women.").

123. Karol V. Mason, *Employment Discrimination Against the Overweight*, 15 U. MICH. J.L. REF. 337 (1982).

124. 42 U.S.C. § 2000e(b) (1988).

125. *See* 29 U.S.C. § 621(a)(1)-(4) (1988 & Supp. V 1993).

Rehabilitation Act,[126] and the ADA,[127] was the large number of people affected by discrimination on the basis of race, age, and disability, respectively.[128] Therefore, because the prevention of employment discrimination against obese individuals is a desirable goal, it seems only logical to pass legislation to prohibit discrimination against obese individuals.[129]

C. Wellness Programs—Another Cautionary Note

More employers are promoting healthy lifestyles for employees.[130] Generally, this is accomplished through a wellness program, which is a combination of activities designed to promote good health and prevent disease. The primary goal of wellness programs is to educate employees on how to modify unhealthy behavior such as smoking or poor eating habits. Typical programs include such services as the taking of a medical history, blood pressure testing, weight control counseling, and cholesterol screening. Increasingly, employers are becoming more pro-active in promoting good health. For example, many employers either provide on-site exercise facilities or subsidize health club memberships. These efforts seem to be paying off. Studies indicate that businesses with wellness programs have shown substantial health-related cost savings, such as decreases in employee absences and turnover, and reduced insurance premiums.[131] In a world recognizing obesity as a potential disability, a viable concern employers may have is whether employee wellness programs are, in and of themselves, discriminatory. The answer seems to be maybe, though not necessarily.

The ADA exempts wellness programs from the Act's strictures so long as they are voluntary and the medical information generated is used in a manner consistent with the ADA's requirements.[132] Programs are considered voluntary so long as an employee is not

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126. *Id.* § 701(a)(1)-(6).

127. *See* 42 U.S.C. § 12101(a)(1)-(9) (Supp. V 1993) (findings and purposes in enacting the ADA).

128. *See supra* notes 128-130 and accompanying text.

129. To date Michigan is the only state to have codified a prohibition against discrimination on the basis of weight. This is the Elliot-Larsen Civil Rights Act, codified at MICH. COMP. LAWS §§ 37.2101-37.2803 (1985) ("The opportunity to obtain employment . . . without discrimination because of religion, race, color, national origin, age, sex, height, weight, or marital status as prohibited by this act, is recognized and declared to be a civil right." MICH. COMP. LAWS § 37.2102 (1985)). The District of Columbia has a statute that does not address weight specifically, but does prohibit discrimination based on personal appearance. D.C. ANN. CODE § 1-2501 (1992).

130. *See Health Promotion: Keeping Employees Physically Fit*, J. ACCT., Sept. 1992, at 21 (among 618 surveyed employers, 76% are making efforts to manage employees' health).

131. *See, e.g.*, George R. Violette, *The Benefits of a Wellness Program*, J. ACCT., June 1991, at 126, 126.

132. 42 U.S.C. § 12112(C)(4)(B) (Supp. V 1993). The EEOC sets out certain requirements concerning the medical records generated from a wellness program: The records must be maintained in a confidential manner, in files separate from the employee's personnel file; they cannot be used to limit health insurance coverage eligibility; and they cannot be used to take adverse employment action or deny promotional opportunities. 29 C.F.R. app. § 1630.14(d) (1995). *See also* HOUSE LABOR REPORT, *supra* note 23, at 75; HOUSE JUDICIARY REPORT, *supra* note 23, at 43-44.

required to participate as a condition of employment.[133]

Considering the language of the ADA, the fact that obesity may be recognized as a disability does not mean wellness programs are per se problematic. An employer simply needs to make sure that the focus of the program is on health, not weight loss. An ideal wellness program emphasizes education, and aims to help individuals lower fat intake and reduce cholesterol levels. Because insufficient exercise is the leading preventable cause of heart disease, an ideal wellness program should also encourage regular, moderate exercise to improve cardiovascular fitness. A program following these guidelines will be well rounded both physically and mentally. It will not promote counterproductive feelings of low self esteem in those who have trouble controlling their weight, and should achieve its goal of lowering an employee's risk level for disease. [134] This, after all, is really what a "wellness" program is all about; promoting health and decreasing the likelihood of future health care costs, rather than encouraging all people to reach a certain, predetermined "ideal" weight.

D. Voluntary Claims

It has been suggested that one concern about recognizing obesity as a disability is the potential flood of "voluntary" condition discrimination claims.[135] An argument to rebut this concern is much the same as the one addressing the possibility of increased perceived disability claims; protecting obesity in certain circumstances, much like protecting alcoholism and drug addiction, falls within the purpose and plan of the ADA. To exclude an obese person who is disabled, or perceived as so, merely because the number of claims may possibly increase due to so called "voluntary" conditions is counter to the intent of

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133. In determining the meaning of "voluntary," it may be helpful to note that under the Age Discrimination in Employment Act, financial incentives to encourage employees to accept early retirement are considered voluntary so long as the employee has the choice to keep working. 29 U.S.C. §§ 621-34 (1988 & Supp. V 1993). Such incentives are voluntary even if the offer is viewed as too good to refuse or the choice is a difficult one. *See* Henn v. National Geographic Soc'y, 819 F.2d 824, 828-30 (7th Cir.), *cert. denied*, 484 U.S. 964 (1987).

134. Bloch, *supra* note 39, at 70 (quoting Adam Drewnowski, Ph.D., Director of the Human Nutrition Program, School of Public Health, University of Michigan).

135. Dunworth, *supra* note 44, at 545. The ADA specifically protects certain "voluntary" conditions such as alcoholism and drug addiction, to the extent that such individuals are not actively using. The Act specifically states that "individual with a disability" does not include an individual who is "currently engaging in the illegal use of drugs when the [employer] acts on the basis of such use." 42 U.S.C. § 12114(a) (Supp. V 1993). While alcoholism is specified by the Act as a disability, the ADA allows employers to hold alcoholics and rehabilitated drug users to the same qualifications or job performance standards as other employees. *Id.* § 12114(c)(4). As a result, discrimination against an individual because of alcoholism or previous drug use is prohibited, but an employer can take action against an employee whose job performance is impaired by active use. *See also* 29 C.F.R. § 1630.3(b)(1)-(3) (1995). Both alcoholism and previous drug use are also protected under the Rehabilitation Act. *See* 45 C.F.R. app. § 84 (1995). The ADA specifically excludes other "voluntary" conditions, such as compulsive gambling, exhibitionism, and transvestitism. 28 C.F.R. § 35.104 (5)(i)-(iii) (1994). Further, diseases such as emphysema and heart disease, which may have been caused or exacerbated by voluntary behavior, have been found to be disabilities under federal law. *See* EEOC brief, *supra* note 64, at 16.

Congress in enacting the ADA. Further, to deny such individuals recourse under the ADA implies a judgment that such individuals are less seriously impaired, or less deserving of legal protection than others who suffer from conditions similarly caused or exacerbated by voluntary conduct, such as alcoholics or rehabilitated drug users.

Admittedly, the same judgment is implied by not allowing claims the ADA specifically excludes; however, the language of the ADA concerning those "abnormalities" is unambiguous and specifically excludes them from consideration as potential disabilities. The language relating to obesity is not nearly as clear. The regulations that implement the ADA specifically provide that there may be times, albeit rare, when obesity may qualify as a disability.[136] Thus, rather than prohibiting claims based on obesity, the regulations concede that such claims may be valid and, instead, limit the claims to rare circumstances. Concern over an increased number of voluntary claims should not override the language of the ADA and implement a bar to obesity claims.

Additionally, concern over increased "voluntary condition" claims is arguably irrelevant here because medical evidence shows that obesity, particularly morbid obesity, is not always a voluntary condition. As noted earlier, while it is not clear exactly how obesity is caused, many factors, including genetic, social, endocrine and metabolic, psychological, and developmental factors, contribute to an individual's obesity.[137] Furthermore, the prognosis for obesity is poor; often, if untreated, it continues to progress.[138] As the *Cook* court indicated, "it is plausible to come to the conclusion that obesity is not a voluntary condition."[139] This renders an argument based on increased voluntary condition claims moot.

E. A Significant Increase in Claims Generally?

It is likely that as more conditions become recognized as possible disabilities, employers will worry that the number of claims filed against them under the ADA will skyrocket, and that the cost of accommodating disabled employees will rise. There is merit to this concern. Each year since the enactment of the ADA, the number of claims brought under it has increased.[140] However, as of November 1993, "failure to hire"

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136. 29 C.F.R. § 1630.2(j) (1995).

137. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 982 (16th ed. 1992).

138. *Id.*

139. Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 23 (1st Cir. 1993). The court makes this observation because Cook had presented expert testimony to the effect that morbid obesity is a "physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse affects within the muscoskeletal, respiratory, and cardiovascular systems." *Id.*

140. *See* Gary Phelan, *Making the ADA a Reality in the Workplace*, TEX. LAW., March 7, 1994, at 22. For example, in August 1992, 384 charges were filed; in August 1993, 1,400 charges were filed. During the first year that Title I was in effect, 12,670 charges were filed with the EEOC alleging discrimination based on disability; and every month since the ADA went into effect, the number of charges filed has increased substantially. *See also Latest EEOC Data Show Record Charges, Sharp Increases In Inventory of Pending Cases*, Daily Lab. Rep. (BNA) No. 152, at D5 (Aug. 10, 1993). From October 1, 1992 to June 30, 1993, 10,737 charges were filed under Title I of the ADA. The ADA now accounts for 16.5% of charges brought to the EEOC.

complaints comprised only 13% of all ADA claims. Nearly one-half of the employment discrimination claims are brought because individuals believed they were discharged due to an actual or perceived disability; "failure to reasonably accommodate a disabled individual" comprises the second largest category of claims.[141] These claims can easily be avoided. Often an employer merely needs to ask employees what they need in order to do the job. Further, according to the EEOC, the good news is that approximately 60% of disabled individuals need no accommodations whatsoever, and about 70% of the necessary accommodations cost employers less than $100.[142] In the case of an obese individual, the necessary accommodations, if any, would be minimal. Generally, an employer needs only to be conscious of the furniture purchased for the business.

Employers also worry about escalating health care costs. It is certainly true that health care costs can be devastating to employers who provide health care to their employees, especially smaller employers.[143] However, considering the statute in question, this is a weak argument. Concern over high absenteeism and increased worker's compensation is a prohibited basis for denying employment;[144] in fact, such reasons contributed to the enactment of the ADA. As the court in *Cook* pointed out, unless absenteeism rises to such a level that the person is no longer qualified, the Rehabilitation Act, and by analogy the ADA, requires employers to "bear absenteeism and other miscellaneous burdens involved in making reasonable accommodations in order to permit the employment of disabled persons."[145]

CONCLUSION

In certain circumstances, obesity should be protected under the ADA. The arguments against this position, and the potential concerns regarding effects of such recognition, pale beside the strong argument made by the EEOC and the rationale in the *Cook* case. This Note in no way advocates recognizing all forms of obesity as a disability. Discrimination against mildly and moderately obese individuals would be best resolved through some form of appearance discrimination legislation. The key phrase for obesity cases under the ADA is "certain circumstances." As the EEOC has recommended, the court should consider whether obesity is an impairment that substantially limits one or more of a person's major life activities on a case-by-case basis, and not subscribe to an all-or-nothing view of the problem.

Employers need to be as sensitive to obese individuals as they are to other individuals who may be considered disabled. They need to examine hiring practices and ensure that their businesses do not perpetuate stereotypes of obese individuals. Employers need to be careful of the wellness program they implement. Although it is understandable that

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141. *See* William Flannery, *Rights Act Generates Few Suits*, ST. LOUIS POST DISPATCH, April 6, 1994, at 8.

142. *See Employment Discrimination: Avoiding Charges of Discrimination Against the Handicapped*, 19 ABA L. PRAC. MGMT. 35 (1993).

143. *See* Jay W. Waks, *Disabilities Act May Affect Medical Costs*, NAT'L L. J., June 15, 1992, at 18.

144. Cook v. Rhode Island, Dep't of Mental Health, Retardation and Hosps., 10 F.3d 17, 27-28 (1st Cir. 1993).

145. *Id.*

employers want to minimize health care costs, they must be careful not to penalize overweight workers or coerce participation. Even without a federal law prohibiting appearance discrimination, employers should employ a person based on that person's qualifications, and not on his or her physical appearance.

INFRARED IMAGING TECHNOLOGY: THREATENING TO SEE THROUGH THE FOURTH AMENDMENT

JEFFREY J. SKELTON*

Saturday morning, 1:00 a.m., August 19, 1994,[1] a helicopter is hovering two hundred feet above the calm waters of a suburban lake. Inside, a pilot and two law enforcement officials gaze at a video monitor. This particular helicopter is equipped with a Forward Looking Infrared Device (FLIR) capable of detecting subtle differences in the surface temperature of objects. As the helicopter turns, homes slowly pan on and off of the screen. Suddenly, the pilot focuses the FLIR on a particular home, the basement glows brightly on the screen. It must be significantly warmer than the basements of neighboring homes. Surprised, one officer looks out the window and is unable to see any difference between the home on the screen and its neighbors. He notes the address and jots a reminder to inform the narcotics division of suspected indoor marijuana cultivation.

The operator, continuing to focus the FLIR, stops at a home with large sliding glass doors off the second floor deck. The door was left open on this cool night and only a thin, opaque curtain covers the opening. On the monitor, infrared images of two people, one significantly larger than the other, are apparently circling each other. Suddenly, the larger image appears to force the smaller one down and a struggle ensues. The officers immediately radio headquarters and request a patrol be sent to investigate. The infrared images once again circle each other on the screen and then leave the vicinity of the thinly curtained window.

Finally, as the last lakefront home comes into range, the FLIR operator's attention is drawn to its attached porch. Easily visible through the thin canvas walls is the heat signature from a television. A few feet away on the floor two figures, oblivious to the far off sound of a helicopter, appear to be sharing an extremely intimate moment. The officers linger over the video display, silently reminiscing about their adolescent exploits, and finally veer the helicopter back to its base.

INTRODUCTION

As shocking as it may appear, the technology highlighted in the above fictional story is a modern reality. The constitutional controversy surrounding this technology began with *United States v. Penny-Feeney*[2] when a Hawaiian federal district court held that the utilization of infrared imaging in the warrantless search of a residence did not violate the Fourth Amendment's proscription against illegal searches and seizures.[3] Some courts have recognized and adopted this opinion with disturbingly little discussion.[4] A few brave

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1. This is a hypothetical situation illustrative of the current state of infrared imaging technology.

2. 773 F. Supp. 220 (D. Haw. 1991), *aff'd on other grounds*, 984 F.2d 1053 (9th Cir. 1993). For a comprehensive discussion of *Penny-Feeney*, see *infra* notes 99-116 and accompanying text.

3. *Id.* at 228.

4. *See, e.g.*, United States v. Ishmael, 48 F.3d 850 (5th Cir. 1995); United States v. Ford, 34 F.3d 992

courts,[5] including the Washington Supreme Court,[6] have, however, rejected it. This division of authority demonstrates the challenge that this technology presents to Fourth Amendment analysis.

The purpose of this Note is to explain infrared imaging and illustrate how law enforcement's warrantless utilization of this technology violates constitutionally guaranteed individual rights. Before constitutional analysis can begin, it is essential to first examine the fundamental conflict between effective law enforcement and individual privacy rights. Second, it is imperative to understand how Fourth Amendment jurisprudence has evolved in addressing these types of controversies. Third, an explanation of this technology is essential to understanding any constitutional analysis. Finally, a criticism of prior court decisions will illustrate why warrantless utilization of this technology violates constitutionally protected rights.

I. THE FUNDAMENTAL CONFLICT

The opening hypothetical situation illustrates the power infrared imaging has to both seduce law enforcement officials and horrify private individuals. As America becomes more violent,[7] and society's scream for relief grows louder,[8] law enforcement's thirst for advanced forms of technology grows. Once carefully sequestered in the tool kit of the military,[9] sophisticated technologies such as infrared imaging are becoming increasingly more available to the public in post cold war America. As societal pressure on law enforcement mounts, the war on crime and drugs is becoming increasingly sophisticated. Criminals are automating their operations[10] and even processing drugs underground.[11]

(11th Cir. 1994); United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994); United States v. Deaner, Nos. 1:CR-92-0090-01, 1:CR-92-0090-02, 1992 WL 209966 (M.D. Pa. 1992), *aff'd on other grounds*, 1 F.3d 192 (3rd Cir. 1993); State v. Cramer, 851 P.2d 147 (Ariz. 1992); State v. Mckee, 510 N.W.2d 807 (Wis. Ct. App. 1993).

5. *See, e.g.,* United States v. Field, 855 F. Supp. 1518 (W.D. Wis. 1994). This case sharply criticized the holding of *Penny-Feeney* and held that warrantless utilization of infrared imaging technology is a violation of an individual's Fourth Amendment rights. For a comprehensive discussion of this case, see *infra* notes 118-93 and accompanying text. *See also* United States v. Cusumano, Nos. 94-8056, 94-8057, 1995 WL 584973 (10th Cir. Oct. 4, 1995). On the eve of this Note's publication, the Tenth Circuit firmly rejected *Penny-Feeney* and clearly distinguished itself from the other circuits by holding that the warrantless utilization of infrared imaging violates the Fourth Amendment.

6. State v. Young, 867 P.2d 593 (Wash. 1994) (en banc).

7. Carolyn Skorneck, *Violent Crime Jumped 5.6% Last Year*, INDIANAPOLIS STAR, Oct. 31, 1994, at A1.

8. *Id.* (quoting Representative Charles Schumer, Democrat New York, "It's no wonder crime is America's Number 1 concern . . ."). Recent passage of the Violent Crime Control and Law Enforcement Act of 1994 ("Crime Bill"), illustrates congressional recognition of increasing societal demands for effective law enforcement. 42 U.S.C.A. §§ 13701-14223 (West 1995).

9. *See generally* Lisa J. Steele, *The View From on High: Satellite Remote Sensing Technology and the Fourth Amendment*, 6 HIGH TECH. L.J. 317 (1991) (discussing the introduction of high tech equipment into the public domain by highlighting satellite imagery).

10. *Marijuana Under the Lights,* FRESNO BEE, Jan. 10, 1991, at B8.

11. *Id.*

Therefore, law enforcement's "competitive enterprise of ferreting out crime"[12] demands utilization of every available alternative to effectively counter evolution of the criminal element.

Unfortunately, law enforcement's utilization of new technologies often conflicts with the constitutional rights of individuals.[13] Woven within the Constitution's democratic framework are the hopes, fears, and values of the framers. While only a governmental framework, this document carries with it the emotional baggage of historically trodden-upon individual rights.[14] The Constitution itself, and the Bill of Rights in particular, exemplify the strongly held view that individual rights should not be sacrificed for the sake of the government.[15] This idealistic view still pervades our society,[16] resulting in an individual's right to privacy being continually asserted against societal demands for effective law enforcement.[17] Therefore, the utilization of some technologies, while effective in fighting crime, nonetheless clash with the shield of individual rights established by the framers.

Infrared imaging technology serves as a poignant example of this continuing conflict. It is, however, uniquely disturbing and foreshadows what society and the courts will confront in the twenty-first century.

II. HISTORICAL EVOLUTION OF THE FOURTH AMENDMENT

The Fourth Amendment[18] encapsulates one of the fundamental freedoms that defines our government. A man's home is his castle. The ideal, that every citizen of our democracy should be able to "dwell in reasonable security and freedom from [government] surveillance,"[19] is distilled into this Amendment, which sought to protect colonists from a recent past of abuse, where they had been tortured by Writs of Assistance.[20] These Writs empowered revenue officers with the discretion to search for

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12. Johnson v. United States, 333 U.S. 10, 14 (1948).

13. *See infra* notes 41-88 and accompanying text.

14. *See generally* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937); JACOB W. LANDYNSKI, SEARCH AND SEIZURES AND THE SUPREME COURT (1966).

15. *See generally* LASSON, *supra* note 14.

16. *See infra* note 23.

17. *See infra* notes 41-88 and accompanying text.

18. The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

19. Johnson v. United States, 333 U.S. 10, 14 (1948). *See also* Camera v. Municipal Court, 387 U.S. 523, 528 (1967) (commenting that "[t]he basic purpose of the [Fourth] Amendment, as recognized by countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials"). *See* LASSON, *supra* note 14.

20. *See generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT

smuggled goods and were recognized as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, there ever was found in an English law book, since they placed the liberty of every man in the hands of every petty officer."[21]

Governmental authority to search property had a turbulent history prior to the advent of the Fourth Amendment and the modern police officer.[22] As our country has transformed itself through the Industrial Revolution, the values embodied by the Fourth Amendment have continued to be grist in the mills of the courts. The question of how much governmental intervention into personal privacy is too much has been continually debated since our democracy's inception. No single constitutional ideal has been so fraught with conflict.[23]

While the Fourth Amendment encapsulates an essential element of a free society, the facts of particular cases and the needs of society have tugged our highest court in circles.[24] As a result, the definition and expanse of rights protected by the Fourth Amendment have gone through tumultuous changes.[25] Ultimately there has evolved a right of privacy, woven from a number of amendments, that establishes a constitutionally protected interest in activities and conversations.[26]

(2d ed. 1986). *See also* LASSON, *supra* note 14.

21. Boyd v. United States, 116 U.S. 616, 625 (1886) (quoting THOMAS COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 301-303 (1868)). This statement was made during a famous debate in Boston, in February, 1761. The debate was perhaps the most prominent event in precipitating the colonies resistance to English oppression. *Id.*

22. *See* LASSON, *supra* note 14. *See also* Marcus v. Search Warrants of Property, 367 U.S. 717, 724-29 (1961) (describing English common law precedents to the Fourth Amendment).

23. *See* Chimel v. California, 395 U.S. 752, 770 (1969) (White, J., dissenting) ("Few areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search 'incident to an arrest.' There has been remarkable instability in this whole area . . . ."). Professor Wayne LaFave notes in the introduction to his renowned treatise:

> [I]t is beyond question that the Fourth Amendment has been the subject of more litigation than any other provision of the Bill of Rights. Indeed, I would be willing to wager . . . that . . . lawyers and judges have spilled more words over the Fourth Amendment than all of the rest of the Bill of Rights taken together.

LAFAVE, *supra* note 20, at v.

24. *See infra* notes 27-91 and accompanying text.

25. *Compare* Katz v. United States, 389 U.S. 347 (1967) *with* Goldman v. United States, 316 U.S. 129 (1942). *See also infra* notes 52-75 and accompanying text.

26. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that the First, Third, Fourth, Fifth, and Ninth Amendments have together established a "penumbra" of constitutional rights of privacy). *See also* William M. Beaney, *The Constitutional Right to Privacy*, 1962 SUP. CT. REV. 212.

A. Fourth Amendment Evolution to 1967

1. Boyd v. United States: Establishment of a Fourth Amendment Cornerstone.—The Supreme Court's decision in *Boyd v. United States*,[27] handed down a century after the passage of the Bill of Rights,[28] was the first Supreme Court decision to grapple with the meaning of the Fourth and Fifth Amendments.[29] The truly monumental aspect of *Boyd* is Justice Bradley's recognition that invasions of individual privacy rights are not defined by particular governmental actions.[30] Rather, the Fourth Amendment protects certain privacy interests regardless of the form of invasion the government employs.[31]

Surprisingly, the *Boyd* decision arose out of a modest dispute between the Boyd firm and the federal government. *Boyd* involved a civil forfeiture proceeding precipitated by the defendant's alleged failure to pay custom duties. After forfeiture proceedings had begun, government officials obtained a court order requiring Boyd to relinquish incriminating invoices. The firm complied, but argued that the statute authorizing the order was unconstitutional.[32]

Justice Bradley's opinion reflected at length on English law as well as the abuses of warrant power that gave birth to the Bill of Rights.[33] Justice Bradley realized that the "principles laid down in this opinion [will] affect the very essence of constitutional liberty

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27. 116 U.S. 616 (1886).

28. The Court's involvement was delayed for two reasons. First, until 1891 the Court lacked the jurisdiction to hear criminal appeals. *See* 26 Stat. 827 (1891). Secondly, Congress only rarely utilized the criminal jurisdiction of the federal government until late in the nineteenth century. *See generally* LASSON, *supra* note 14.

29. *See generally* LASSON, *supra* note 14. *See also* Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under The Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977). *Boyd* created an absolute protection around private papers, even court ordered searches were considered unreasonable.

However, this impenetrable shield placed around private papers has been steadily eroded by the Court. The erosion culminated with two cases, Andersen v. Maryland, 427 U.S. 463 (1976) and United States v. Doe, 465 U.S. 605 (1984). The *Andersen* Court held that business records could lawfully be seized pursuant to a warrant. 427 U.S. at 478-480. The Court failed to focus on the private nature of the papers but instead noted that Andersen voluntarily created the documents and upon their seizure was not compelled to say or do anything. 427 U.S. at 472-74. The *Doe* Court reaffirmed the holding that voluntarily created business records are not protected from governmental warrants. 465 U.S. at 610. *See also* Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27 (1986) (presenting a comprehensive analysis of these cases and their Fifth Amendment consequences).

30. *Boyd*, 116 U.S. at 630.

31. *Id. See generally* Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647 (1988) (Professor Gutterman articulates the view that *Boyd v. United States* establishes a "value dominated" model of Fourth Amendment jurisprudence. This value dominated view is then contrasted with later Supreme Court opinions which focus upon whether a physical trespass has been committed.).

32. *Boyd*, 116 U.S. at 617.

33. *Id.* at 624-32.

and security."[34] He also realized that the factors surrounding the establishment of the Fourth Amendment demonstrate the enormous value the framers placed upon securing their property and privacy from governmental intrusion.[35]

Most importantly, Justice Bradley forged into Fourth Amendment analysis the concept that the manner in which governmental intrusion occurs is irrelevant to deciding whether protected rights have been abridged.[36] He reasoned that the Amendment applies to "all invasions on the part of the government and its employees and is not limited to a man's home but emcompasses all the 'privacies of life.'"[37] The *Boyd* opinion sought to establish a maximum level of protection for individual privacy consistent with historical precedents. This expansive attempt at protection was bound to be modified;[38] however, it still remains the cornerstone of Fourth Amendment jurisprudence[39] that established a basic right of all men "to be let alone."[40]

2. *Erosion of the Value Approach and Establishment of a Trespass Model.*—The language of *Boyd*, while zealously protecting individual rights, erected a mighty shield against law enforcement. In *Olmstead v. United States*,[41] the pragmatic considerations of effective law enforcement led to the first breach of *Boyd*'s shield.

Olmstead involved new technology—the wire tap. The defendants were convicted of conspiracy to violate the National Prohibition Act.[42] The central evidence was obtained by insertion of small wires into the defendant's ordinary telephone lines. Without trespass onto any property of the defendants, federal prohibition officers were able to intercept

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34. *Id.* at 630.

35. "The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole." *Id.* at 627 (quoting Lord Camden's discussion in Entick v. Carrington, 19 Howell's State Trials 1029 (1765)).

36. *Id.* at 630.

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense, it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment, and the Fourth Amendment.

Id. Justice Bradley's forceful language clearly denounces the idea that the manner of invasion is a factor in determining Fourth Amendment violations.

37. *Id.*

38. *See supra* note 29. *See also* Note, *The Life and Times of* Boyd v. United States *(1886-1976)*, 76 MICH. L. REV. 184 (1977).

39. The foundation of *Boyd* was expanded in two landmark cases: Weeks v. United States, 232 U.S. 383 (1914) (holding that the "unconstitutional manner" in which evidence was seized would render otherwise admissible evidence inadmissible) and Gouled v. United States, 255 U.S. 298 (1921) (where the Court established the "mere evidence" rule).

40. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (relying on *Boyd*, this article pioneered the concept of a fundamental right to privacy encompassing the right of every man to be let alone).

41. 277 U.S. 438 (1928).

42. Pub. L. No. 66-85, 41 Stat. 305 (1919), *repealed by* U.S. CONST. amend. XXI.

incriminating conversations encompassing the sale and distribution of liquor.[43] Justice Taft sided with effective law enforcement[44] by formulating a majority opinion that directly addressed the Fourth Amendment and established that the Amendment only applies to "material things" of the person: houses, papers, and effects.[45] Justice Taft reasoned that since telephone communications are not material things, they cannot be the subject of a search or seizure. In addition, Justice Taft established the postulate that the lack of a physical trespass would not allow a finding that the Amendment was violated.[46] Therefore, unlike *Boyd*, the type of governmental action in *Olmstead* was not the type the framers of the Amendment were addressing.[47]

Olmstead's new interpretation, that violations of the Fourth Amendment require a physical trespass, was a clear break with precedent,[48] and precipitated a vigorous dissent from Justice Brandeis. He viewed the Fourth Amendment as protecting a basic right of personal privacy[49] and implored the Court to look into the future where the ability of the government to invade personal privacy would only increase.[50] It was his impression that the majority's abandonment of *Boyd*'s protections, and its focus on the requirement of a trespass, ignored the ideals embodied in the Fourth Amendment.[51]

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43. *Olmstead*, 277 U.S. at 455-58.

44. Justice Holmes, in his dissent, also recognized that this case involved deciding among competing goals, that criminals should be apprehended and that the government should not foster the criminal element. He resolved this conflict by concluding: "[I]t [is] less evil that some criminals should escape than that the government should play an ignoble part." *Id.* at 470 (Holmes, J., dissenting).

45. *Id.* at 464.

46. *Id.* ("There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the house or offices of the defendants.").

47. *Id.* at 463.

48. *See* Lopez v. United States, 373 U.S. 427 (1963) (Brennen, J., dissenting). "*Olmstead's* illiberal interpretation of the Fourth Amendment as limited to the tangible fruits of actual trespass was a departure from the Court's previous decisions, notably *Boyd*, and a misreading of the history and purpose of the Amendment." *Id.* at 459.

49. *Olmstead*, 277 U.S. at 478 (1928) (Brandeis, J., dissenting).

50. *Id.* at 474.

> The progress of science in furnishing the government with the means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to the jury the most intimate occurrence of the home.

Id.

51. *Id.* at 478.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

3. Affirmance of the Trespass Model.—The increasing sophistication of listening devices, predicted by Justice Brandeis, quickly endowed governmental eavesdroppers with the ability to remotely monitor conversations without any appearance of a trespass. In *Goldman v. United States*,[52] the warrantless use of a Dictaphone microphone that allowed the recording of an attorney-client conversation from the opposite side of a partition was upheld because the microphone did not penetrate the attorney's wall. There was no physical trespass and hence no search prohibited by the Fourth Amendment.[53]

Goldman's method of analysis was later bolstered by the Court's decision in *Silverman v. United States*[54] where a spike mike[55] was placed through a minor penetration in a wall in order to overhear conversations of the defendant. The *Silverman* Court upheld the trespass analysis of *Goldman* by finding that the spike mike's trespass, no matter how minor, rendered Silverman's conversation constitutionally protected.[56] Analyzing the means of surveillance, in order to determine constitutional violations, exemplifies the forewarned pitfall of Justice Brandeis, causing the lines of constitutionally prohibited law enforcement activity to emerge in an arbitrary manner.[57] Despite the majority's opinion in *Silverman*, it is important to note that reliance upon a trespass analysis was criticized by members of the *Silverman* Court, setting the stage for yet another shift in Fourth Amendment analysis.[58]

B. Katz v. United States: The Value Model Reemerges

1. The Majority Opinion: The Pendulum Swings Back.—Katz v. United States[59] marked a new beginning, a virtual rebirth of early Fourth Amendment jurisprudence. The Court in *Katz*, like *Boyd*, sought to forge a model having ramifications far beyond the direct holding of the case.[60] The Court believed that the recent cases of "*Olmstead* and *Goldman* had been so eroded . . . that the 'trespass' doctrine there enunciated can no longer be regarded as controlling."[61] This sharply modified view, rooted in *Boyd*, once again dispelled the notion that the means utilized by the government to intrude upon individual privacy is the main factor in determining violations of the Fourth Amendment.

Id. at 478-79.

52. 361 U.S. 129 (1942).

53. *Id.* at 135.

54. 365 U.S. 505 (1961).

55. A spike mike is a specially designed microphone placed on a long rod or wire that can be inserted into small openings in order to covertly hear conversations.

56. *Silverman*, 365 U.S. at 509. Justice Stewart's analysis hinged upon finding that some constitutionally protected space had been invaded. Surprisingly, in just a few short years, Justice Stewart would be given the chance to revisit this decision and would overrule it. *See infra* notes 59-75 and accompanying text.

57. *Silverman*, 365 U.S. at 513 (Douglas, J., concurring). Justice Douglas concludes that the invasion is equal whether or not the microphone penetrates the wall. Therefore, the analysis should hinge not on theories of trespass but rather on "whether the privacy of the home was invaded." *Id.*

58. *Id.*

59. 389 U.S. 347 (1967).

60. *Id.* at 353.

61. *Id.*

The facts of *Katz* are surprisingly uncomplicated. The defendant was convicted of violating a federal statute prohibiting the electronic transmission of wagering information across state lines.[62] FBI agents, who had been observing the defendant for a period of time, noted his pattern of placing periodic phone calls from a particular phone booth. The inculpatory evidence was obtained when agents attached an electronic listening and recording device to the outside wall of a public phone booth used by the defendant. The agents were then able to monitor and record the defendant's side of conversations regarding the taking and placing of illegal wagers.

Prior to *Katz*, this type of surveillance would not have offended the Fourth Amendment,[63] and the prosecutorial argument was driven by this historical perspective.[64] The Court focused on whether Katz had a constitutionally protected privacy interest in a place where he had no property interest; indeed, no one did because it was a public phone booth. The Court took Fourth Amendment jurisprudence 180 degrees back to *Boyd*, by declaring the Amendment "protects people, not places,"[65] and holding that a person in a telephone booth may rely on the Amendment's protection. Once again individuals had a privacy interest that could be constitutionally protected, under appropriate circumstances, irrespective of their location or law enforcement's techniques.[66]

While the major impact of the *Katz* decision was its rejection of the idea that Fourth Amendment violations are determined by an analysis of property rights and trespass law,[67] the Court was careful to limit its decision in a number of important ways. First, the Court stated that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'"[68] Second, while the Court established the premise that the Amendment

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62. 18 U.S.C. § 1084 (1964) (providing in pertinent part that "(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers . . . shall be fined no more than $10,000 or imprisoned not more than two years, or both").

63. *See supra* note 52 and accompanying text.

64. *Katz*, 389 U.S. at 352 (1967).

65. *Id.* at 351.

66. *Id.* The Court recognized the vital role that the public telephone has come to play in private communication, but that factor was not the basis of the protection afforded. Rather, the protection stemmed from the fact that the defendant took steps reasonably calculated to afford privacy. Therefore, individuals must take some measures to ensure the privacy of their activities before the Fourth Amendment can be utilized as a constitutional shield.

67. *Id.* at 353 (holding that "it becomes clear that the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure"). *Id.* This view obviates the concern expressed by Justice Douglas's concurrence in *Silverman* that Fourth Amendment lines were being drawn in an arbitrary manner. *See supra* note 57 and accompanying text.

68. *Katz*, 389 U.S. at 350. The Court went on to clarify that:

> [The] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.

Id.

"protects people, not places,"[69] it also stated that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not the subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[70]

2. Justice Harlan's Concurrence: The Two-Pronged Katz Test.—In Justice Harlan's concurrence, the commentary and holding of the majority opinion was distilled into a "reasonable expectation of privacy test."[71] Although the language of Harlan's test is not found in the majority opinion, this test has been seized upon, cited repeatedly, and is generally considered the essence of *Katz*.[72] Justice Harlan's two-part test is a marriage of the subjective expectations of the individual and society's willingness to accept those expectations as reasonable.[73] Therefore, in analyzing the phone booth conversation of the defendant in *Katz*, it was clear to Justice Harlan that the defendant had taken steps to evidence his subjective expectation of privacy and society was willing to accept that expectation as reasonable.[74] Justice Harlan also reiterated the view of the majority that a trespass analysis is inappropriate.[75] The Fourth Amendment now stood on a foundation that respected individual privacy rights which the court hoped would produce consistent analyses of future controversies.

C. The Fourth Amendment Since Katz

The nation's evolution since 1967 has forced the Supreme Court to continually reevaluate the extent to which law enforcement's "competitive enterprise of ferreting out crime"[76] infringes upon individual liberty. Justice Harlan's two-part test, while still the standard, has undergone significant assault by the Supreme Court.[77] Even Justice Harlan

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69. *Id.* at 351.

70. *Id.*

71. *Id.* at 361.

72. *See* Cardwell v. Lewis, 417 U.S. 583 (1974); United States v. Dionisio, 410 U.S. 1 (1973); Terry v. Ohio, 392 U.S. 1 (1968).

73. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Justice Harlan's "understanding of the rule . . . is that there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.*

74. *Id.*

75. *Id.* at 362. Justice Harlan, agreeing that *Goldman* should be overruled, stated that *Goldman's* "limitation on the Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion." *Id.*

76. Johnson v. United States, 333 U.S. 10, 14 (1948).

77. *See generally* Melvin Gutterman, *Fourth Amendment Privacy and Standing: "Wherever the Twain Shall Meet,"* 60 N.C. L. REV. 1 (1981). In *Smith v. Maryland*, Justice Blackman, speaking for the Court, recognized that the *Katz* test may be "an inadequate index of Fourth Amendment protection. For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry" no individual could possibly have a subjective expectation of privacy. 442 U.S. 735, 741 (1979). In *Oliver v. United States*, Justice Powell, speaking for the Court, commented that "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity." 466 U.S. 170, 182 (1984).

expressed misgivings about his own formula for Fourth Amendment analysis.[78] In addition, commentators have freely criticized the Supreme Court's varying interpretations of *Katz's* mandate.[79]

1. Dow Chemical and Ciraolo.—Exactly 100 years after *Boyd v. United States*,[80] the Supreme Court once again addressed the tension between governmental activities and the privacies of life. During the 1986 Term, in *Dow Chemical v. United States*[81] and *California v. Ciraolo*,[82] the Court applied the *Katz* test. Chief Justice Burger, speaking for the majority in both cases, resurrected notions compelling Fourth Amendment analysis to consider the manner in which law enforcement seeks to infringe upon an individual's privacy.[83]

In *Dow Chemical*, Dow refused to allow officials from the Environmental Protection Agency (EPA) to perform an onsite inspection of their new facility. Exceptional corporate security surrounded it. Rather than seek an administrative warrant, EPA officials employed an aerial photographer to provide surveillance of the facility.[84]

In *Ciraolo*, police officers acting on an anonymous tip and without a warrant flew over the defendant's residence and photographed marijuana plants growing in his yard. The officers had to resort to aerial photography because the yard was protected from ground level view by six foot and ten foot tall fencing.[85]

The Chief Justice's analysis in both cases focused on the manner in which information was obtained, emphasizing that officers were located within public vantage points and that any member of the flying public could have made identical observations.[86] In *Ciraolo*, Chief Justice Burger determined that because any public observer could have obtained information equivalent to that secured by the officers, the defendant could have had no reasonable expectation of privacy in the contents of his garden.[87] Furthermore, by exposing his garden to the aerial observer, the defendant assumed the risk of law enforcement discovering his criminal activities.[88]

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78. United States v. White, 401 U.S. 745 (1971) (Harlan, J., dissenting). "The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk." *Id.* at 786.

79. *See, e.g.*, Michael Campbell, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence*, 61 WASH. L. REV. 191 (1986); William S. McAninch, *Unreasonable Expectations: The Supreme Court and the Fourth Amendment*, 20 STETSON L. REV. 435 (1991); David E. Steinberg, *Making Sense of Sense Enhanced Searches*, 74 MINN. L. REV. 563 (1990); Richard G. Wilkins, *Defining the 'Reasonable Expectation of Privacy': An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077 (1987).

80. 116 U.S. 616 (1886).

81. 476 U.S. 227 (1986).

82. 476 U.S. 207 (1986).

83. *Dow Chemical*, 476 U.S. at 237 (Chief Justice Burger stated that the "narrow issue raised . . . concerns aerial observation . . . without physical entry."); *Ciraolo*, 476 U.S. at 213 ("The police observations here took place . . . in a physically nonintrusive manner." (citation omitted)).

84. *Dow Chemical*, 476 U.S. at 229-30.

85. *Ciraolo*, 476 U.S. at 209-10.

86. *Id.* at 213.

87. *Id.* at 214.

88. *Id.*

2. *The Modern Court: Striking a Balance.*—The *Dow* and *Ciraolo* Court's reliance on the manner in which the surveillance was done, and its commentary concerning public exposure, have provided no shortage of criticism.[89] While a critique of these decisions is outside the scope of this Note, one can fairly state that the pragmatic considerations of effective law enforcement have forced the Court into utilizing an elastic interpretation of *Katz*. A number of decisions illustrate the Court's willingness to view assumption of the risk and public exposure as decisive factors disallowing expectations of privacy.[90] While *Katz* is in no way repudiated, the Court has stretched the analysis of Justice Harlan's two-part test to include additional factors. These additional factors create a balancing test permitting invasive law enforcement activities to be upheld as constitutional. In certain situations society's interest in preserving effective law enforcement has been held to outweigh individual privacy rights.[91] Therefore, recent Court opinions hint that the second aspect of the *Katz* test is actually an assessment of whether an alleged governmental search is unreasonable.

III. INFRARED IMAGING: A FOURTH AMENDMENT ANALYSIS

A. Technological Description of Infrared Imaging

Electromagnetic radiation is defined by an extensive spectrum from x-rays on one end to radio waves on the other. The visible portion of the spectrum, with which we are the most familiar, takes up only a small fraction.[92] The infrared spectral region is somewhat larger but significantly less energetic than the visible portion. Every object gives off infrared radiation the amount of which is dependent upon its temperature. The heat one feels from the glowing embers of a campfire is an example of infrared radiation.

Infrared imaging devices detect differences in the surface temperature of objects from the infrared radiation emitted. They do not determine absolute temperature in the same manner a thermometer does.[93] Therefore, if an item has a temperature identical to its background, an infrared imaging device will not be able to see it regardless of shape, color, or size. The comparable visual analogy is a polar bear in a snow storm. Additionally, this technology is analogous to vision in that, unlike radar, it is completely passive.[94] It does not generate any beams or rays,[95] and only receives emitted radiation. Therefore, the subjects of infrared surveillance have no means of knowing they are being monitored.

Most importantly, this technology has the ability to see through materials one would traditionally consider opaque. For example, thin plywood, curtains, roofing, and plastics,

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89. *See supra* note 79.

90. *See supra* notes 80-89 and accompanying text.

91. An excellent example of this is in the area of the canine sniff. Few could claim that this law enforcement activity does not invade the privacy of an individual, however, the Court views the needs of society outweighing the privacy interest invaded. *See infra* notes 112-15 and accompanying text.

92. *See generally* Karen Geer, *The Constitutionality of Remote Sensing Satellite Surveillance in Warrantless Environmental Inspections*, 3 FORDHAM ENVTL. L. REP. 43 (1991).

93. United States v. Penny-Feeney, 773 F. Supp. 220, 223 (D. Haw. 1991).

94. United States v. Porco, 842 F. Supp. 1393, 1395 (D. Wyo. 1994).

95. *Penny-Feeney*, 773 F. Supp. at 223.

depending upon the circumstances, can all be transparent to infrared radiation.[96] The ability to detect heat from within a structure ranges up to many miles, depending upon the sophistication of the particular imagery.[97] Therefore, the location of individuals, their movements, and the relative temperature of rooms, described in the introductory hypothetical, could be easily discerned with current technology.

B. Penny-Feeney v. United States: Application of the Katz *Test*

Over the last thirty-five years, the *Katz* test has been utilized to resolve many varied and novel clashes between law enforcement and individual privacy rights.[98] Law enforcement's utilization of infrared imaging technology poses yet another unique challenge to the *Katz* test. The Fourth Amendment analysis of infrared imaging began in the summer of 1991, when the case of *Penny-Feeney v. United States*[99] first brought this technology under constitutional scrutiny. The court in *Penny-Feeney* held that the utilization of noninvasive methods to image "waste" or "abandoned" heat from a publicly accessible vantage point did not offend the Fourth Amendment.[100]

1. The Facts of Penny-Feeney v. United States.—In early 1990, an anonymous informant led police to the defendants. The informant described in detail a sophisticated indoor marijuana cultivation system encompassing a number of rooms in the defendant's residence. After speaking to the informant, Officer Char corroborated the details by visiting the location. He then hired a helicopter equipped with a Forward Looking Infrared Device (FLIR). A few hours before dawn, the pilot and two law enforcement officers flew over the defendants' residence at an altitude of 1200-1500 feet. To the naked eye the residence appeared dark, but with the assistance of the FLIR, the walls and certain areas of the garage appeared as bright white. Adjacent similar structures were surveyed for comparison and did not appear in the same color as the defendant's residence. Upon consultation with the pilot, Officer Char concluded the heat signature was consistent with the indoor cultivation of marijuana. Based upon Officer Char's testimony, a search warrant was issued and an extensive indoor marijuana cultivation operation was discovered.[101]

2. Analysis by the Penny-Feeney Court.—The *Penny-Feeney* court first reiterated Justice Harlan's two part *Katz* test: (1) the defendants must have exhibited a subjective expectation of privacy; and (2) society must acknowledge the defendant's expectation of

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96. *See* United States v. Olson, 21 F.3d 847, 848 (8th Cir. 1994) (noting that infrared imaging revealed rafters inside the defendant's home as well as a wall dividing the home into two rooms); *see also* State v. Young, 867 P.2d 593, 595 (Wash. 1994) (noting that infrared imaging has the ability to detect individuals through thin curtains, plywood, or similar material).

97. *See generally* Steele, *supra* note 9.

98. It would be impractical to mention the number of ways in which the *Katz* test has been utilized; as of this writing, references to Katz v. United States, 389 U.S. 347 (1962), in *Shepard's United States Citations* exceed 400 cases. 1.6 SHEPARD'S UNITED STATES CITATIONS 1119-36 (Case ed. 1994).

99. 773 F. Supp. 220 (D. Haw. 1992).

100. *Id.* at 228.

101. *Id.* at 221-23.

privacy as reasonable.[102] The court characterized the heat detected by Officer Char as "heat waste" or "abandoned heat."[103] The court concluded that the defendants did not have an expectation of privacy in the heat because "they voluntarily vented it outside the garage where it could be exposed to the public and in no way [did they] attempt[] to impede its escape or excercise dominion over it."[104] Even though the court concluded that the defendants failed to pass the first part of the *Katz* test, the *Penny-Feeney* court referred to the Supreme Court's holding in *California v. Greenwood*[105] and considered whether society would be willing to accept as reasonable a subjective expectation of privacy in the heat waste.[106]

In *California v. Greenwood*,[107] the Supreme Court held the Fourth Amendment does not prohibit government officials from conducting a warrantless search of trash relinquished for collection. In *Greenwood*, police officers asked the neighborhood trash collector to segregate the trash bags picked up from the defendant's home from the trash of everyone else. The trash collector turned the defendant's trash over to the police and, upon examination, the police discovered incriminating evidence of narcotics use. Based upon this evidence, a search warrant was issued, and the defendant was arrested and convicted. The defendant challenged the warrantless search of his trash, alleging a violation of his Fourth Amendment rights. The Supreme Court concluded the defendants exposed their garbage to the public to such a degree they could have no reasonable expectation of privacy.[108]

The *Penny-Feeney* court explained that the heat waste vented outside of the Feeneys' home was analogous to the garbage placed outside of the respondent's home in *Greenwood*.[109] The court held that "[b]oth cases involve[d] homeowners disposing of waste matter in areas exposed to the public."[110] Given this holding, the *Penny-Feeney* court concluded that "even if the defendants were capable of demonstrating a subjective expectation of privacy in the heat waste, the Supreme Court's holding in *California v. Greenwood*, suggests that such an expectation would not be one that society would be willing to accept as objectively reasonable."[111]

The *Penny-Feeney* court then recognized Supreme Court decisions upholding the

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102. *Id.* at 225 (citing Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring)).

103. *Id.*

104. *Id.* at 226.

105. 486 U.S. 35 (1988).

106. *Penny-Feeney*, 773 F. Supp. at 226.

107. 486 U.S. 35 (1988).

108. *Id.* at 41.

109. *Penny-Feeney*, 773 F. Supp. at 226. In drawing the analogy, the *Penny-Feeney* court quoted the following language from *Greenwood:*

> Here we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops and other members of the public.

Id. (quoting *Greenwood*, 486 U.S. at 40).

110. *Id.*

111. *Id.* (citation omitted).

utilization of nonintrusive extrasensory equipment.[112] Of all the nonintrusive police activities, the court held that the canine sniff was most analogous to infrared imaging.[113] In *United States v. Solis*,[114] the Ninth Circuit Court of Appeals held that utilizing specially trained marijuana sniffing dogs, whose sense of smell is eight times as acute as humans, does not constitute a search under the Fourth Amendment.[115] The court in *Penny-Feeney* reasoned that the use of infrared imaging, like the use of canines in *Solis*, is inoffensive and entails no embarrassment to the defendant. The *Penny-Feeney* court further reasoned that the heat emanations, like the odor in *Solis*, constitute a physical fact indicative of a possible crime.[116]

The *Penny-Feeney* court held that officer Char did no more than aim a *passive* infrared detector from a publicly accessible vantage point and detect waste heat on the exterior of a home. No intimate details of the house were observed and the nonintrusive nature of the instrument caused no embarrassment. Therefore, these activities did not constitute a search under the Fourth Amendment.[117]

IV. ILLEGITIMACY OF THE *PENNY-FEENEY* POSITION

As already illustrated, issues arising under the Fourth Amendment pose complex analytical challenges. Although the debate surrounding the proper format of any analysis continues, recent Supreme Court decisions suggest a type of dual analysis. First, a proper utilization of Justice Harlan's two-part test must be employed to determine if the challenged governmental activity constitutes a search. Second, the Court may then carve out exceptions by balancing the interests of society against the privacy interests of the individual.[118]

A. Infrared Surveillance of the Home Constitutes a Search: Application of the Katz Test

1. Individuals Have a Subjective Expectation of Privacy in Heat Lost From Their Home.—The first stage of analysis is to determine whether subjective expectations of privacy were asserted over the subject matter of the alleged search.

a. Infrared surveillance targets the home.—The Fourth Amendment analysis of

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112. *Id.* The court cited the following cases: United States v. Place, 462 U.S. 696 (1983) (holding canine sniff of luggage is not a search); United States v. Knotts, 460 U.S. 276 (1983) (holding utilization of electronic beeper to track movements of vehicle to a remote cabin is not considered a search); Smith v. Maryland, 442 U.S. 735 (1979) (holding that the use of a "pen register" to record phone numbers dialed from a private residence is not a search).

113. *Penny-Feeney*, 773 F. Supp. at 226.

114. 536 F.2d 880 (9th Cir. 1976).

115. *Id.* at 882. "The method used by the officers was inoffensive. There was no embarrassment to or search of the person. The target was a physical fact indicative of possible crime . . . . [T]he use of the dogs was not unreasonable under the circumstances and therefore was not a prohibited search under the Fourth Amendment." *Id.* at 883.

116. *Penny-Feeney*, 773 F. Supp. at 227.

117. *Id.* at 228.

118. *See supra* notes 80-90 and accompanying text.

infrared imaging requires understanding the purposes for which the technology is being used. It is essential to step back and appreciate that law enforcement officials are employing this technology to gain information about what may or may not be occurring inside a home. The remaining discussion of this Note will focus only on that context. While it is acknowledged that this technology has other applications, an exhaustive analysis would encompass significantly different issues and would obscure the focus of this writing.

The security of one's home is a fundamental interest protected by the Fourth Amendment. To appreciate the emphasis the framers put on this liberty interest, one need only look to the language of the Amendment: "The right of the people to be secure in their . . . houses . . . shall not be violated . . . ."[119]

The discussion today is not whether the numbers dialed from our phones have been intercepted,[120] or whether our car has been tracked electronically,[121] or whether our speech has been overheard.[122] While these are serious issues in and of themselves, the following discussion centers around more than a general right to privacy. We need to recognize, as the framers did 200 years ago, the most intimate, private, and sacred moments of our lives take place within our homes. Infrared imaging effectively acquires information about individuals while they are at home, not while they are in public. The analysis of an individual's right to retreat to his home and take solace in the fact that his actions, expressions, and words are not being monitored, demands the highest level of scrutiny.[123]

b. Infrared imaging reveals activities occurring within the home.—A number of courts, in upholding the use of infrared imaging, have sought to establish that it does not invade or expose activities occurring within the home.[124] This fact is heavily relied upon for justification of the technology's legitimacy, however, the abhorrent logic of this justification demands criticism.

If infrared imaging technology does not reveal activities occurring within a person's home then why are governmental officials using the technology? More significantly, why are attorneys wasting time and money defending its use? Do the law enforcement officials have fun looking for heat? Do their attorneys simply enjoy a fight? One can hardly think so. Perhaps it is a question of semantics. No one contends infrared imaging can see through walls as if they do not exist. Conversely, no one can justifiably argue with the fact that infrared imaging provides "visual images of varying clarity that allow the operator to draw . . . conclusions about what is happening on the other side of the house wall."[125] Infrared imaging can determine the interior structure of a dwelling and can even

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119. U.S. CONST. amend. IV.

120. Smith v. Maryland, 442 U.S. 735 (1979).

121. United States v. Knotts, 460 U.S. 276 (1983).

122. United States v. Katz, 389 U.S. 347 (1967).

123. The attempt to delineate the appropriate degree of scrutiny largely contributes to the turmoil in Fourth Amendment jurisprudence.

124. United States v. Ford, 34 F.3d 992, 996-97 (11th Cir. 1994) (FLIR only describes "conditions within the mobile home in gross detail." The information gained is "neither sensitive nor personal, nor does it reveal the specific activities within the mobile home."); Penny-Feeney v. United States, 773 F. Supp. 220, 228 (D. Haw. 1992) ("No intimate details connected with the use of the home or curtilage were observed . . . .").

125. United States v. Field, 855 F. Supp. 1518, 1525 (W.D. Wis. 1994). *See supra* note 96 and

discern the presence of individuals through materials considered opaque. The only value to law enforcement officials in the heat escaping from a home is what it discloses about potentially illegal activities occurring within the home.[126] Therefore, it is disingenuous for the government to argue that nothing occurring within the home is being revealed. The entire goal of the government's exercise is to determine what is occurring within a particular home. It is disappointing that courts would be fooled by this ridiculous argument.

c. The analogy to trash fails.—The *Penny-Feeney* court's attempt to analogize infrared imaging to searching through trash fails for a number of reasons. The characterization of heat emitted from a house as waste is too simplistic and the assumption, based on *Greenwood*,[127] that society would not recognize any subjective expectation of privacy in that heat is inappropriate.

It is troubling to say that "one voluntarily vents heat waste in the same way that one disposes of garbage."[128] Homeowners certainly do not give the same level of thought to heat escaping from their homes as they do to taking out the trash. Trash removal is a "conscious act that affirmatively demonstrates an abandonment of the contents . . . ."[129] Heat loss happens without any conscious act of the homeowner. It occurs automatically and is unavoidable.[130] Therefore, this unconscious heat loss is not *waste*.[131] Rather, as defined by *Greenwood*, only heat purposefully vented to the outside could be characterized as waste.

Infrared imaging detects all of the heat leaving a home, not just vented heat. It detects differences in room temperatures, floor temperatures, electrical wiring temperatures,[132] and much more.[133] Therefore, if the *Penny-Feeney* court were truly applying the *Greenwood* Court's analysis, the government could permissibly point its FLIR at the back of an air conditioner or venting fan, but it could not point it at any window, door, wall, roof, or chimney. Law enforcement officials would not likely "have much interest in creating thermal images of the back of air conditioners, but only such heat fits within the concept upon which the warrantless search is premised."[134] Therefore, the heat uncontrollably escaping from a home is legally unrelated to trash that is consciously transported curbside.

d. Degree of invasiveness is irrelevant.—The first startling aspect of the *Penny Feeney* decision is the court's emphasis or desire to characterize infrared technology as

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accompanying text, explaining that FLIR can discern the presence of human forms near open windows or behind walls made of plywood or similar materials.

126. State v. Young, 867 P.2d 593, 603 (Wash. 1994).

127. United States v. Greenwood, 486 U.S. 35 (1988).

128. *Young*, 867 P.2d at 602.

129. *Field*, 855 F. Supp. at 1532.

130. *Id.*

131. *Id. See also Young*, 867 P.2d at 603 (holding that unconscious heat loss cannot be analogized to waste).

132. *Young*, 867 P.2d at 595.

133. *See supra* note 96 and accompanying text.

134. *Field*, 855 F. Supp. at 1532.

passive or noninvasive.[135] Any focus on this aspect of an alleged search is absurd, for it echoes the trespass doctrine abandoned by *Katz*. Justice Bradley established over a century ago that it is not "the breaking of [one's] doors and the rummaging of [one's] drawers, that constitutes the offense . . . ."[136]

Passive devices are quite capable of invading an individual's reasonable expectation of privacy. The premier example is *Katz* itself. The microphone in *Katz* was completely passive. Like infrared imaging, it sent no beams or rays into the phone booth. Yet the *Katz* Court went to great lengths to highlight this "passive" technology as capable of violating an individual's Fourth Amendment rights.[137] Similarly, courts have prohibited the government from using high powered telescopes to peer inside peoples' homes,[138] even though these telescopes are completely passive and only collect visible light. Additionally, nonconsensual warrantless wiretaps are prohibited even though they are completely passive and simply collect an electronic signal passing through a wire located outside the home.[139] These decisions demonstrate that an analysis hinging upon the passivity of law enforcement's technique is misguided.

e. Individuals have a subjective expectation of privacy in heat lost from their homes.—"[A] man's home is, for most purposes, a place where he expects privacy . . . ."[140] Infrared imaging targets the home and reveals information connected with intimate activities. The majority of heat detected involuntarily dissipates from the home and can in no way be characterized as waste. Therefore, individuals must be viewed as having subjective expectations of privacy in the heat lost from their homes.

2. Society Views That Subjective Expectation as Reasonable.—By virtue of the above argument, individuals can be viewed as having subjective expectations of privacy in the heat emanating from their homes; whether that expectation is one that society is willing to recognize as reasonable must also be analyzed.

a. Analogy to trash fails once again.—The Court in *Greenwood* conceded that individuals may have a subjective expectation of privacy in their trash but held such an expectation is one that society is not willing to accept as reasonable.[141] The Court cited a number of reasons for reaching this conclusion. First, it is "common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public."[142] Second, individuals take their trash to the curb "for the express purpose of conveying it to a third

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135. United States v. Penny-Feeney, 773 F. Supp. 220 (D. Haw. 1991) "It is a passive, non-intrusive instrument . . . ." *Id.* at 223. "FLIR . . . did no more than gauge . . . heat." *Id.* at 225. "Time and time again the United States Supreme Court has held that police utilization of extra-sensory, non-intrusive equipment, such as the FLIR . . . does not constitute a search . . . ." *Id.* at 226. "Officer Char did no more than aim a passive infrared instrument at the defendants' house . . . ." *Id.* at 228.

136. Boyd v. United States, 116 U.S. 616, 630 (1886). *See supra* note 36.

137. *See supra* notes 59-75 and accompanying text.

138. *See* United States v. Taborda, 635 F.2d 131 (2nd Cir. 1980) and United States v. Kim, 415 F. Supp. 1252 (D. Haw. 1976).

139. 18 U.S.C. § 2510 (1994).

140. Katz v. United States, 389 U.S. 347, 361 (1967).

141. United States v. Greenwood, 486 U.S. 35, 39 (1988).

142. *Id.* at 40.

party"[143] who is then free to do as she chooses with the trash. The Court concluded that one who deposits garbage "in an area particularly suited for public inspection and . . . for the express purpose of having strangers take it," can have no reasonable expectation of privacy surrounding the items it contains.[144]

Again the analogy of infrared imaging to trash fails for a number of reasons. It is "hardly common knowledge that government officials cruise public streets after dark scanning houses with thermal imagers . . . ."[145] Unlike trash, heat lost from a house is not subject to the risk of animals, children, snoops, and the like. One would certainly not anticipate the public using sophisticated infrared instruments to view one's home the same way one would anticipate the public scrutiny of trash. Put simply, society does not protect privacy interests in trash because everyone knows other people have the opportunity to look through it. Conversely, very few people have the ability to analyze heat emanating from one's home. Therefore, the differences between one's trash and the heat escaping from one's home are such that a comparison is ludicrous.

b. The home is afforded special protection.—Society's protection of privacy interests concerning the home is further established by the Supreme Court's analysis of electronic monitoring devices. In *United States v. Knotts*,[146] the Court upheld law enforcement's utilization of an electronic beeper to allow surveillance of the defendant's automobile.[147] In *Knotts*, law enforcement officials suspected the defendant was illegally manufacturing controlled substances. Based on his unusual purchase of chloroform, a solvent commonly used in the manufacture of illicit drugs, the officers arranged for a drum, with an electronic signaling device inside, to be included in the defendant's next purchase. After the subsequent purchase, the officers used the signal from the beeper to follow the defendant from Minnesota to rural Wisconsin. The beeper was only used to determine the location to which the defendant drove.[148]

The Court held that someone traveling in an automobile does not have a legitimate expectation of privacy in his movement from place to place.[149] Anyone on the street could note the fact that the defendant was traveling over certain roads, at a particular time, in a particular direction, and observe his final destination. The Court noted that a car has "little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."[150] The beeper utilized by the government procured no additional information than would have a bystander, and the Fourth Amendment challenge failed for that reason.[151]

One year later, in *United States v. Karo*,[152] the Court dealt with an electronic beeper

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143. *Id.*

144. *Id.* at 40-41 (quoting United States v. Reicherter, 647 F.2d 397, 399 (3d Cir. 1981)).

145. United States v. Field, 855 F. Supp. 1518, 1532 (W.D. Wis. 1994).

146. 460 U.S. 276 (1983).

147. *Id.* at 285.

148. *Id.* at 277-79.

149. *Id.* at 281.

150. *Id.* (quoting Cardwell v. Lewis, 417 U.S. 583 (1974)).

151. *Id.* at 276.

152. 468 U.S. 705 (1984). *Karo* represents the United States Supreme Court's most recent analysis of law enforcement's use of sense enhanced surveillance.

that was taken inside a home. In that case, the Court held that the warrantless monitoring of an electronic beeper while inside a private residence violated the Fourth Amendment.[153] The facts of *Karo* are nearly identical to those of *Knotts*, with the exception that, in *Karo*, the law enforcement officials continued to monitor the device when it had entered several homes. The Court affirmed the fact that while in public there was no protected privacy interest. When the beeper crossed the threshold of a home, however, the continued monitoring constituted a search violating the Fourth Amendment.[154] The Court noted that the device provided information about the interior of the home which was unavailable through unaided visual surveillance of the home's exterior.[155] Therefore, the expectation of privacy one has in one's home will trigger Fourth Amendment protection when the government seeks information about what is occurring within the home that "could not have otherwise [been] obtained without a warrant."[156]

Infrared imaging is at least as intrusive as the beeper in *Karo*. It also provides information about the interior of a home that is unavailable to the naked eye. While the beeper cannot reveal its specific location within the home, infrared imaging has the ability to determine the specific location of heat intimately connected with human activity. Reasonable expectations of privacy in the home, tenaciously defended for two centuries, demand that government's warrantless utilization of infrared imaging stop short of the wall of any home.

c. The expectation of privacy is reasonable.—"The test of legitimacy . . . is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment."[157] The rationale defeating the analogy to trash establishes the reasonableness of an individual's privacy expectations. People unconsciously relinquish heat to the outdoors and they certainly do not assume that their neighbors have the ability to analyze such heat loss. Individuals cannot be viewed as assuming the risk of this type of surveillance because they have no practical means of preventing it. Law enforcement does not have the right to exploit every risk created by modern life. Therefore, subjective expectations of privacy in heat lost from a home would be recognized as reasonable by society.

3. Law Enforcement's Use of Infrared Imaging Constitutes a Search.—It has been established that the passivity of infrared imaging is not an element of Fourth Amendment analysis. It has also been shown that governmental officials utilize infrared imaging to produce images of a home's interior that would otherwise be protected by its walls.[158] In this way, the government is intruding into the home, an area afforded special protection, and discovering information about what occurs inside. Individuals have reasonable expectations of privacy in the activities occurring within their homes, "a location not open to visual surveillance."[159] "It is this reasonable expectation of privacy in the home that is violated by warrantless infrared surveillance, not the expectation of privacy in 'waste heat'

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153. *Id.* at 714.

154. *Id.* at 721.

155. *Id.*

156. *Id.* at 715.

157. United States v. Oliver, 466 U.S. 170, 182-83 (1984).

158. *See supra* note 96 and accompanying text.

159. *Karo*, 468 U.S. at 716.

as the *Penny-Feeney* court asserts."[160]

B. Individual Rights Outweigh Society's Need for Infrared Surveillance

1. Fourth Amendment: In the Balance.—In facing the myriad of cases before it, the Supreme Court has utilized the *Katz* equation and an accompanying balancing test to reach differing results.[161] In addition, recent cases suggest an increasing reliance on ad hoc balancing.[162] Despite the criticism this ad hoc approach has received,[163] this Note must recognize that the Court has responded to law enforcement's pragmatic needs by incorporating a balancing test into its Fourth Amendment analysis.

2. Law Enforcement: Legitimate Needs for High Technology.—Society's interest in defeating crime is the precise reason the Fourth Amendment, though protective by design, still allows search warrants to be issued. Individuals do not have exclusive protection and our modern society has a "compelling interest in detecting those who would traffic in deadly drugs for personal profit."[164] Without argument, the modern criminal element is more daring and sophisticated than ever. Our society, on the other hand, seems ill-equipped to handle the increasing onslaught.[165] For full effectiveness, law enforcement requires access to the best and latest technology. Infrared imaging technology has proven cost effective as well as successful in detecting indoor marijuana cultivation.[166] Finally, law enforcement only utilizes this technology from publicly

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160. State v. Young, 867 P.2d 593, 603 (Wash. 1994).

161. The Court has occasionally utilized a balancing approach which yielded a reliable bright line rule. For example, warrantless wiretaps have consistently been held unconstitutional. *See* United States v. United States Dist. Court, 407 U.S. 297 (1972); Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967). *See also* Florida v. Riley, 488 U.S. 445 (1989); Dow Chemical v. United States, 476 U.S. 227 (1986); California v. Ciraolo, 476 U.S. 207 (1986). The Court has yet to require a warrant for aerial surveillance. In other situations, bright line rules have failed to emerge. *Compare* United States v. Knotts, 460 U.S. 276 (1983) (allowing warrantless electronic monitoring of a vehicle on public streets) *with* United States v. Karo, 468 U.S. 705 (1984) (disallowing warrantless use of the same device located within a residence).

162. *See* New Jersey v. T.L.O., 469 U.S. 325, 342 (1985) (permitting the warrantless search of a high school student "when the measures adopted are reasonably related to the objective of the search and are not excessively intrusive"); *see also* Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602 (1989) (permitting warrantless blood and urine tests, "[t]hough some of the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts . . ."). *Id.* at 628.

163. *See generally* Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Analysis*, 63 N.Y.U. L. REV. 1173, 1175-76 (1988) ("Fourth Amendment rights . . . should receive the more certain protection resulting from categorical rules rather than the less certain protection resulting from ad hoc balancing."); Silas J. Wasserstrom & Louts M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L. J. 19 (1988).

164. United States v. Mendenhall, 446 U.S. 544, 561 (1980) (Powell, Burger, & Blackmun, JJ., concurring).

165. Recent passage of the "Crime Bill" demonstrates the congressional view that more prisons and police are the best answer. *See* 42 U.S.C. §§ 13701-14223 (1994).

166. This point is easily demonstrated by law enforcement's increasing use of this technology. *See supra* note 4.

accessible vantage points and gains limited information.

3. Individual Privacy Rights: Demanded By a Free Society.—The Fourth Amendment is a prohibition in that it protects some portion of our individual lives from governmental intrusion. This ideal is a basic tenet of a free society.[167] The facet of the Amendment that protects individual privacy is the most elusive. Privacy values, by their very nature are not quantifiable. There is no consensus in the legal or philosophical literature as to their meaning.[168] They defy definition, but not characterization.

While the Fourth Amendment protects "people, not places,"[169] it does not shield what one willingly exposes to the public.[170] It does, however, protect conversations[171] and the intimacies of life. It encompasses the "home"[172] and the right of every man "to be let alone."[173] It also demands that privacy not be infringed without probable cause and that a warrant be issued by a detached magistrate. The Amendment seeks to protect future citizens from the abuses of the past and ensures a society where individuals can freely express themselves within private contexts.

4. The Analogy to Canine Sniff Fails.—The *Penny-Feeney* court tried to analogize infrared imaging to the canine sniff, an area where the Supreme Court has held the needs of law enforcement outweigh the privacy interest invaded. Relying on *United States v. Solis*,[174] the court compared infrared imaging to the use of dogs trained to detect the odor of narcotics[175] and reasoned that, like a dog sniff, infrared imaging is "inoffensive" and "entail[s] no embarrassment."[176] In addition, the court reasoned that heat emanations, like odors of narcotics, are a physical fact "indicative of a possible crime."[177] Although somewhat similar to the trash analogy, after careful scrutiny, the comparison of infrared imaging to a canine sniff also fails to be convincing.[178]

First, the fact that a method of search is inoffensive or nonembarrassing is not dispositive. As previously discussed, law enforcement need not break down one's doors to violate Fourth Amendment rights.[179] In fact, one of the most disturbing characteristics of infrared imaging is its ability to tracelessly pry into the home. The haunting of sleeping citizens by indiscriminately discerning information about the intimate activities occurring within their homes can only be considered offensive. Reasonable people would be shocked to discover that some courts think otherwise.

Second, the pattern of heat emanating from a home is not indicative of criminal

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167. Camera v. Municipal Court, 387 U.S. 523, 528 (1967).

168. *See generally* Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974).

169. Katz v. United States, 389 U.S. 347, 351 (1967).

170. *Id.*

171. *Id.* at 350.

172. Text of the Amendment expressly names the house. *See supra* note 18.

173. *See* Warren & Brandeis, *supra* note 40, at 193.

174. 536 F.2d 880 (9th Cir. 1976).

175. United States v. Penny-Feeney, 773 F. Supp. 220 (D. Haw. 1991).

176. *Id.* at 227.

177. *Id.*

178. *See, e.g.*, United States v. Field, 855 F. Supp. 1518 (W.D. Wis. 1994); State v. Young, 867 P.2d 593 (Wash. 1994).

179. *See supra* note 36.

activity in the same way that a canine sniff indicates criminal activity. In *United States v. Place*,[180] the Supreme Court upheld the use of a trained dog to sniff luggage in search of contraband. The Court recognized the information obtained by the search is limited. "It does not expose non-contraband items that otherwise would remain hidden from public view. . . . [I]t discloses only the presence or absence of narcotics, a contraband item."[181] In this respect the search of luggage by a trained canine is "sui generis."[182] There is no other investigative procedure so limited in manner and content of information gained.[183]

The information gained by infrared imaging is not so limited, for it cannot distinguish between "contraband heat" and "legal heat."[184] The instrument registers all heat from a residence. Operators are free to draw whatever inference they want from the information gained. Heat could be generated by electronic equipment, fireplaces, saunas, or the cultivation of legal plants. When a trained dog signals the presence of narcotics in a location, there is no doubt that a crime is being committed.[185] That statement cannot be made concerning infrared imaging. The heat detected could have come from any number of legal sources. In addition, "a dog's sense of smell, while more acute than a human's, does not compare to a technology that can turn minute gradations in temperature into video tapes from 1500 feet away."[186] For the mentioned reasons, the Supreme Court's statement that the canine sniff is "sui generis"[187] must be respected.

Even if a canine sniff were viewed as an appropriate analogy, the Supreme Court of Washington, in *State v. Young*,[188] found the reasoning of *United States v. Thomas*[189] more persuasive than that of *Solis*. In *Thomas*, the Second Circuit held that the use of a trained canine to detect the presence of narcotics from outside the defendant's apartment door constituted a search violating the Fourth Amendment.[190] The *Thomas* court highlighted that a private residence was the subject of a search and recognized that the defendant had a "legitimate expectation that the contents of his closed apartment would remain private . . . ."[191] Because the defendant had a "heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search" violating the Fourth Amendment.[192] Other courts have also recognized enhanced expectations of privacy when

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180. 462 U.S. 696 (1983).

181. *Id.* at 707.

182. *Id.* "'Sui generis', of its own kind or class, *i.e.*, the *only one* of its kind; peculiar." BLACK'S LAW DICTIONARY 1000 (6th ed. 1991).

183. *Place*, 462 U.S. at 707.

184. United States v. Ishmael, 843 F. Supp. 205, 213 (E.D. Tex. 1994), *rev'd*, 48 F.3d 850 (5th Cir. 1995), *certs. denied*, 116 S. Ct. 74 (1995) *and* 116 S. Ct. 75 (1995).

185. There are very few exceptions, namely the rare medical use of a few select narcotics.

186. *Ishmael*, 843 F. Supp. at 213.

187. *Place*, 462 U.S. at 707; United States v. Cusumano, Nos. 94-8056, 94-8057, 1995 WL 584973 (10th Cir. Oct. 4, 1995).

188. 867 P.2d 593 (Wash. 1994) (en banc).

189. 757 F.2d 1359 (2nd Cir. 1985), *certs. denied*, 474 U.S. 819 (1985) *and* 479 U.S. 818 (1986).

190. *Id.* at 1359.

191. *Id.* at 1367.

192. *Id.*

those expectations concern the home.[193] Infrared imaging, like the canine sniff in *Thomas*, detects information about the happenings inside one's home. One could inappropriately compare infrared imaging to the canine sniff. The result, however, considering the *Thomas* court's prohibition on utilizing the sniff to discern information about the interior of an home, would still be an unconstitutional search.

5. The Balancing.—Law enforcement's need for infrared imaging does not outweigh the intimate privacy interest that it invades. First, the intimate details obtained may chill an individual's free expression;[194] for the home, a uniquely private and historically protected area, is the usual target of these searches. Second, the information obtained is broad and unfocused. Unlike the canine sniff, infrared imaging is not limited to detecting only criminal activity. It exposes the intimate activities occurring within a home, legal and criminal alike. Third, any reliance upon the aerial surveillance cases, *Dow* and *Ciraolo*, to justify infrared surveillance is foolish. These cases deal only with visual surveillance and forewarn about applying their analysis to sensory enhanced searches.[195] Finally, this technology allows law enforcement officers to survey previously unidentified third parties and may encourage inappropriate police conduct.[196] The information gained is neither crucial to the war on drugs[197] nor specific enough to be indicative of criminal activity. Therefore, it cannot overcome the compelling individual privacy interest against which it is pitted.

CONCLUSION

"At the very core [of the Fourth Amendment] stands the right of a [person] to retreat into his own home and there be free from unreasonable governmental intrusion."[198] Infrared imaging reveals intimate activities of the home and is used indiscriminately. In

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193. *See, e.g.,* United States v. Taborda, 635 F.2d 131 (2nd. Cir. 1980) (holding the Fourth Amendment proscribes the use of a telescope by a patrolman only so far as it enhanced his view of the interior of a home); United States v. Kim, 415 F. Supp. 1252 (D. Haw. 1976) (holding the Fourth Amendment protects activities occurring within the home from governmental telescopic surveillance).

194. Justice Harlan, dissenting in *United States v. White*, was disturbed that wide spread monitoring of wireless communication "might well smother that spontaneity--reflected in frivolous, impetuous, sacrilegious, and defiant discourse--that liberates daily life." 401 U.S. 745, 787 (1971) (Harlan, J., dissenting).

195. Dow Chemical v. United States, 476 U.S. 227 (1986).

> Here, EPA was not employing some unique sensory device that, for example, could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise, commercial camera commonly used in mapmaking. . . . It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public . . . might be constitutionally proscribed absent a warrant.

Id. at 238.

196. *See* Steinberg, *supra* note 79, at 569 (contending that secret surveillance may chill free expression and encourage arbitrary police conduct).

197. Police often utilize other means of unearthing marijuana gardens, for example, excessive electric and water bills are often cited as probable cause for a search warrant. *See supra* note 5.

198. Silverman v. United States, 365 U.S. 505, 511 (1961).

that regard, its utilization resembles the unrestrained search for smuggled goods that brought the Fourth Amendment into being.[199] In addition, it is less discriminating than the canine sniff and its use cannot be analogized to trash. The question of whether infrared imaging is offensive or invasive, while controversial, is irrelevant. For these reasons the warrantless use of infrared imaging to gain information about activities occurring within the protected environment[200] of an individual's home transgresses the prohibitions of the Fourth Amendment.[201]

The basic tenet of the Constitution is that it applies to the innocent and guilty alike.[202] The courts must not be duped into believing that simply because invasive technology can be utilized from a public vantage point that it is outside the Fourth Amendment's umbrella.[203] If unchecked, law enforcement's indiscriminate use of this technology would force individuals to cower in their cellars in search of true privacy.[204] As the long and harried history of Fourth Amendment jurisprudence demonstrates, the tension between individual privacy rights on the one hand and society's ever evolving technological sophistication on the other will never be obviated. The courts must take care that the war on drugs not count individual rights as one of its casualties. "The benefits to our society of safeguarding the right to privacy is such that there is a limit to the use of technological weapons, even in the war on drugs."[205]

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199. *See* LASSON, *supra* note 14.

200. *See supra* notes 145-55 and 186-91.

201. "Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached upon proper showing." Johnson v. United States, 333 U.S. 10, 14 (1948).

202. Draper v. United States, 358 U.S. 307, 315 (1959) (Douglas, J., dissenting).

203. *See* LANDYNSKI, *supra* note 14, at 44.

> History also makes it clear that the searches to be controlled were . . . those carried out under public authority, in the name of the law, not those made by private persons . . . . The private snooper might certainly be dealt with under statute or common law, but it was not to his actions that a constitutional provision was directed.

See also United States v. Kim, 415 F. Supp 1252, 1256 (D. Haw. 1976) (stating that "[p]eeping Toms abound does not license the government to follow suit").

204. Anthony G. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349 (1974). Professor Amsterdam predicted this possibility by stating: "[A]nyone can protect himself against surveillance by retiring to the cellar, cloaking all the windows with thick caulking, turning off all the lights and remaining absolutely quiet." *Id.* at 402.

205. United States v. Ishmael, 842 F. Supp. 205, 208 (E.D. Tex. 1994), *rev'd*, 48 F.3d 850 (5th Cir. 1995), *certs. denied*, 116 S. Ct. 74 (1995) *and* 116 S. Ct. 75 (1995).